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THE HISTORY

OF THE

ENGLISH CONSTITUTION.

BY

DR. RUDOLPH GNEIST,

PROFESSOR OF LAW AT THE UNIVERSITY OF BERLIN.

TRANSLATED BY

PHILIP A. ASHWORTH,

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CONSTITUTIONAL HISTORY OF ENGLAND.

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THE PERIOD OF THE GROWTH OF THE ESTATES OF THE REALM.

(*Continued.*)

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The Share of the Commons in the Parliament—Origin of the Lower House.

In addition to the deliberative, judicial, and taxing assemblies of the prelates and barons, Edward I. repeatedly summoned deputies of the *communitates*, without formally binding himself to the irregular procedure of 49 Henry III. The warlike King, in want of money, found in the wars which he undertook to increase his island-realm, the most valid reason for summoning his faithful *communitates* to "meet common dangers with common resources," and to take counsel with the King as to the means of carrying on war, and raising funds. This proceeding is first clearly shown in 10 Edward I. (24th November, 1282), when, after the conquest of Wales, four knights from each shire, and two deputies from different towns were summoned "to hear and to do such things as should be laid before them on the part of the King." Once again, in

11 Edward I. (on the 30th September, 1283) there were summoned to the parliament at Shrewsbury (in addition to one hundred and ten earls and barons), two knights from each shire, and two burgesses from each of twenty-one towns, to deliberate on the affairs of conquered Wales. In 18 Edward I. (1290), the sheriffs were directed to send two or three knights from each shire "*ad consulendum et consentiendum his quæ comites barones et proceres tum duxerint concordanda,*" but no deputies of the towns. The object was the framing of important statutes, particularly the statute *Quia Emptores* as to the alienability of the fiefs. In 23 Edward I. (30th September, 1295), in the stress of war, two knights from each shire, and two burgesses from each town were commissioned "*ad faciendum, quod tunc de communi consilio ordinabitur;*" upon which a considerable grant of aids was made. After this great parliament at Westminster, at which two hundred deputies from the towns appeared, the summons of counties and boroughs was repeated under the same reign several times in the following years.*

* This epoch of Edward has been treated of in detail in the Peers' Report (i. 171–254). As early as 1 Edward I. we find four knights from each shire, and four deputies of the towns summoned, but only as deputations for taking the oath of allegiance. In 3 Edward I. the statute of Westminster 1 mentions the earls, barons, and the "*communitas,*" but only in the sense of the aggregate Crown vassallage. The grants of subsidies are made by the prelates and barons alone in the name of the "*alii de regno.*" In 11 Edward I. we find the first formal deputation of four knights of the shire, and two men of the towns, who shall appear "endowed with full powers from their *communitas,*" to hear and to do as shall be referred to them on the part of the King; thirty-two counties shall send their men to Northampton, five shall send their deputies to York. This is a primitive, as yet irregular formation (Peers' Report, i. 187, 188). To the later parliament at Shrewsbury (11 Edw. III.), for the deliberations respecting the incorporation of Wales, two knights were summoned from each county, and deputies for London and twenty other cities. The statute of Acton Burnell *de mercatoribus* was, however, passed by the "King and his counsel;" the collaboration of the commoners is not discernible in it (Report, i. 189–191). In 12 Edward III. the statutes of Wales and Rutland appear to have been issued under the sole authority of the King (Report, i. 191, 192). In 13 Edward I. the statute *de donis conditionalibus*, the statute of Westminster 2, and the confirmation of Magna Charta were again proclaimed without the assistance of the *communæ*, "*habito super hoc cum suo concilio tractatu*" (Report, i. 194). In 16 Edward I. the Chancellor of the Exchequer (after the barons have refused a subsidy) imposes a *tallagium* upon the towns and demesnes. In 18 Edward I. the sheriffs were ordered to send two or three knights *de discretioribus* with full powers for themselves and the *communitas comitatus*

No constitutional record had as yet acknowledged the necessity for such a summons; but what once took place under Henry III., in a time of tumult and on compulsion, was repeated by a wise monarch in recognition of a political necessity. He wished to ask and hear the commons, and have their consent to certain things, so that they might contribute money with the more readiness. Accordingly two kinds of convocations occur—

1. *A general summons* for the purpose of strengthening the laws, and redressing national grievances, such as had been already attempted at the time of the barons' war, but had not been established.

2. *A special summons* for a grant of tax, or deliberation of certain political acts, which had several times taken place in the former reign.

The summonses were for a long while very discretionary, and the number of the towns varied greatly. The writs of summons are directed to the sheriffs, sometimes immediately to the town magistrates; the deputies receive special instructions, and on account of money transactions there appear as a rule two from each *communitas*, in order to exercise mutual control over each other. The King was accustomed to receive their petitions at the commencement of the proceedings; and at the close to dismiss them with his thanks,

"*ad consulendum et consentiendum his quæ comites et barones et proceres tum duxerint concordanda;*" five counties send three knights, all the rest two knights; towns are not summoned. The object was probably to gain the consent of the vassals of the Crown to the statute *Quia Emptores* as to the alienability of the fiefs (Report, i. 197–204). In 22 Edward I. two knights *de discretioribus* were summoned with full powers "*ad consulendum et consentiendum;*" by a second writ the sheriffs were subsequently ordered to send two additional knights (Report, i. 211). In 23 Edward I., in the time of war and pecuniary embarrassment, the first regular summons takes place (the original writs of which still exist), of two *milites* from each county, and two burgesses from each one of one hundred and fifteen cities and boroughs "*ad faciendum quod tunc de communi consilio ordinabitur.*" The object is the obtaining of an important subsidy (Report, i. 217, 218). In 24 Edward I. a new grant of subsidy for the counties and towns is made. In 25 Edward I. the statute *de tallagio* was passed, which will be discussed below. In 27 Edward I. the statutes *de finibus levatis* and *de falsa moneta* were again proclaimed without the assistance of the *communæ*. In 28 Edward I. occurs the summons of three deputies from the shires to a *concilium* without the summons of the cities; in 34 Edward I. a general grant of subsidies in a *concilium* otherwise irregularly convoked.

and with the request that they would be prepared for any new call. It was not until the last year of Edward I.'s reign that they were mentioned in the preamble to a statute. But from that time forth their importance, like that of the hereditary peerage, slowly advances, corresponding to the increasing importance of the local unions for State-service and State-taxation. Because these State rights are connected with corresponding State duties, the Lower House attains a share in the Government, not (like the peerage) by participating in the royal judicial power, but in another direction, viz.: Firstly, in the granting of taxes; secondly, in the central government, by means of petitions and motions; and thirdly, in legislation.

I. **The taxation of the counties and towns** was at first the unmistakable object of the Lower Houses being convened. Under Edward I. it was no longer doubtful what was meant by "*faciendum*."

For two generations it had been an established fact that the ordinary revenue of the King was insufficient to cover the needs of the country, and that it required to be periodically supplemented by taxes (extraordinary revenue). For more than two generations it had been an established fact that these subsidies neither could nor ought to be provided by the *auxilia* and *scutagia* of the Crown vassals alone, but that, in due proportion, the *auxilia* (*tallagia*) of the towns, freeholders, and farmers of the demesnes should also contribute a hide-tax (*carucagium*—the *carucata* equals a hundred acres), and that personal property should be liable to the extent of a fraction of the total income (one-tenth, one-fifteenth, etc.).

Since Henry III. began to reign it had been established by numerous grants and refusals, that such universal impositions of taxes should be negotiated in a *concilium* of the Crown vassals.

The time had now arrived in which these various groups of taxes necessarily developed into a general land-tax and income-tax, upon the following principles:—

1. The way was prepared for the blending of all the indivi-

dual taxes that were raised from landed property, into a general land-tax, by the exaction of a contribution from hides on the occasion of the Saladin tithes, on the ransom of Richard I., and in the *carucagium* of 1194; and then again several times under Henry III. (for example, in 1220). But it was no easy task to make this method of taxation acceptable to the Crown vassals.

The *scutagia* were only intended to serve as the substitution money of a knight's service for campaigns which were really intended; but experience had long since taught that the royal council, in case of need, could feign a campaign *ad hoc*.

The *auxilia* of the feudal vassals were only due in certain cases where the honour and the necessity of the feudal lord were involved; but it was still possible to appeal successfully to the patriotism of the highest council of the Crown, showing that a case of need in the person of the sovereign ought not to be waited for, but that a clear need of the national government was just as important as the cases of honour and necessity in his person; regard, however, being had to the fact that the vassals had already been severely burdened in their heavy *relevia* and other feudal dues.

The military fiefs were, according to the feudal register, assessed at like amounts for the aids as for the scutages; whilst the *carucagia* of the common possessions were at first taxed according to the hides, but afterwards according to the actual produce, by the assessment commissions of the county. It was now certainly in harmony with the usage of the landed interest to leave the rate of the land-tax, when once fixed, as far as possible unchanged, and in the same manner it was incompatible with the honour of the great vassals to allow themselves to be assessed by committees of the townships. But on the whole, the rating according to the actual yield of the hides was more favourable for the knights' fees, and the new assessment became still more acceptable when, having regard to their other feudal dues, the knights' estates were assessed at a somewhat lower rate, and their honour was guarded by the fact that special commissions were appointed

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with the co-operation of the Crown vassals for the assessment of this tenure.

It will be shown below that the above views led to the formation of the general land-tax, raised according to a uniform rate from the whole county.

2. A supplementary tax raised from personal property had originated long before in the royal claim to the *tallagia* of the farmers of demesnes and towns. It was manifestly in the interest of the taxpayers that the amounts should be uniformly fixed by proceedings in Parliament. Quittances of fee-farm and purchased guarantees were in themselves checks upon the unbounded arbitrariness of the Exchequer. In another direction the civic revenue had increased to such an extent, by trade and industry, that it had become a considerable source of taxation side by side with landed estates. Undeveloped as were the economic notions of the Middle Ages, it was perceived even in those days that in addition to indirect taxation, a direct taxation—that is, a taxing of the total income of individuals—was reasonably justified. On the raising of the Saladin tithes, and at the ransom of Richard I., this kind of assessment had come into use; John had extended it in his arbitrary manner to the whole population; under Henry III. it had been repeatedly applied, though with the exception of the clergy, and probably with a special rating for the Crown vassals. Making such allowances principally in the case of an assessment at a lower rate, regard being had to the other burdens imposed upon the *tenentes in capite*, the income-tax was suited to be raised as a usual accompaniment and supplement of a general land-tax, which it had actually become.

3. The extension of the land and income-tax to the clergy had been so far accomplished in the preceding period that the prelates, after some opposition, peaceably paid the aids and scutages imposed upon their great landed possessions, so far as they were held by barony, and in such cases made their grants in common with the temporal vassals of the Crown. On the other hand, they resisted the taxing of their

other revenue arising from land held by ordinary tenure, tithes, offerings, and surplice fees, etc., although these had contributed to the Saladin tithes, and apparently also to the ransom of Richard I. But meanwhile the papal rule had accustomed the English clergy to a heavy taxation of their whole income, and had assessed the rich English ecclesiastics on a most profitable scale. The taxation of the smaller livings, which under other circumstances would have been difficult to justify, could in England be justified by the disproportionate amount of their income. And now that a general income-tax for the lay population had become the rule, a time came in which, influenced by a higher patriotic feeling, the English clergy, if they were to pay income-tax, would rather pay it to the King than to the Roman bishop. As a matter of fact it was soon seen that they made no serious resistance, on being forced to make payment to the King, so long as the point of honour remained intact, so that the clergy granted their income-tax through special commissioners, under special arrangements, and, as far as possible, according to a fixed rate.

4. The exaction of the tolls and duties on consumable goods was certainly in some measure limited by the usage of the former period, but was subject to the police control of the King, and to his right as the arbiter of commerce to regulate the ports and markets, which right frequently led to attachments of property and to special transactions with foreign and native merchants; whilst (as people by degrees became convinced) the payments wrung from the dealers fell finally as imposts upon the consumers. It became more and more manifest that the exaction of indirect imposts could not well be separated from the grant of direct taxes.

Such was the state of the taxation of the country, which under Edward I. led to a stormy crisis, not unlike the course of events accompanying the origin of Magna Charta; yet with this material difference, that on this occasion of general resistance offered to a great monarch by his country, each side acted loyally and with confidence in the loyalty of the other.

Edward, suffering under the evil effects of the barons' war and the bad economy of his father, began his reign with financial embarrassments, which, owing to his numerous wars, became much aggravated. The brilliant successes of his rule, however, placed him in the position of being able to appeal successfully to the patriotic feelings of his prelates, barons, and *communæ*, who, as a rule, willingly responded to the greatest calls made upon them. In the year 1294, however, being compelled to extreme exertions by the military events upon the Continent and his obligations towards his allies, he resorted to violent measures, demanding not less than the half of the clerical revenues, after he had already attached the treasure of the Church and the wool of the merchants; yet after long negotiations he contented himself in the following year with one-tenth from the clergy, one-eleventh from the barons and knights, and one-seventh from the towns. In the ensuing year, whilst the needs of war became intensified, Pope Boniface VIII., in the bull "*Clericis laicos*" of 24th February, 1296, intervened with an absolute prohibition to the clergy to pay any tax whatever out of the revenues of the Church; whereupon Edward answered by confiscating the estates appertaining to the archbishop's see, and declaring the whole of the clergy "outside the pale of his protection" (that is, in outlawry). In this critical situation the great constable and the marshal, in harmony with the feelings of the Crown vassals, refused to do their services for the expedition to Gascony, withdrew after a violent altercation, and prepared for armed resistance. Edward, thus hard pressed, again resorted to a distraint upon all the wool of the merchants, to the imposition of heavy payments in kind upon the counties, and then to a levy of all those capable of bearing arms, including both feudal vassals, and all tenants of £20 value. Thus at length the whole of the people, with the city of London at their head, were driven to resistance, with the clergy in outlawry, and the barons in arms; and again did the two great officers of the feudal army refuse to do their feudal duty, and left the army. Yet

the King succeeded, by irregular negotiations, in obtaining one-eighth from the barons and knights, one-fifth from the towns, and a proportionate amount from the clergy, with whom conciliatory negotiations were carried on. In this state of affairs, on the 22nd August, 1297, the King was obliged to join his army on the Continent, leaving behind him his son and a council of regency, which latter forthwith found itself compelled to enter into negotiations with the discontented earls and a strong armed force. Their demand aimed at the renewal and completion of Magna Charta by a clause concerning the general right of the estates to consent to all grants of taxes. The Prince Regent, with the concurrence of his council, accepted the proposal, and signed it on the 12th October, 1295. In consideration of the internal and external position of the country, Edward I. ratified these proceedings on the 5th November, 1295, in a charter dated from Ghent (Foedera, i. 880), with the magnanimous resolution to keep his royal word, to which, as a fact, he did remain true. This *Confirmatio Chartarum*, in a French and in a Latin text, contains a fundamental law which may be compared with that of Magna Charta, to the undying glory of the monarchy, in contrast to the events of 1215. The French text (Statutes of the Realm, i. 124, 125), which was incorporated into the collection of statutes, is the authentic text; the less perfect Latin text, however, as *statutum de tallagio non concedendo*, has been repeatedly acknowledged, in the judgments of the courts, to be a fundamental law of the realm. (2)

(2) The events leading to the origin of the statute 25 Edward I. stat. 1, c. 5, 6 (1297), are referred to in detail, with the addition of the French and Latin text in Stubbs (Select Charters, pp. 487, 498); the French text with an English translation is in the Statutes of the Realm (pp. 124, 125). The Latin text with the heading, "*Articuli inserti in Magna Charta*" is given by Walter de Hemingburgh (ii. 153, 154), with considerable omissions in comparison with the French text. The Latin text is apparently the incomplete draft laid before the regent for his ratification, and not confirmed by any official document, but which was recognized in the preamble of the Petition of Right under Charles I. in the following form as a statute recognized by legal decisions:—

"*Nullum tallagium vel auxilium per nos vel hæredes nostros de cætero in regno nostro imponatur seu levetur sine voluntate et assensu communi archiepiscoporum, episcoporum et aliorum praelatorum, comitum, baronum, militum, burgensium et aliorum liberorum hominum in regno nostro.*"

On the demand of the barons this

The right of the estates of the realm, at this time consisting of the prelates, barons, and *communitates* together, to grant taxes, had now become so unconditionally acknowledged that an increase of the tolls and indirect taxes, without the express consent of Parliament, was unequivocally excluded by the framing of the Act in its authentic French text—

"*E ausi avoms grante as evesques et as contes et barons et a tote la communaute de la terre, que mes pur nul busoigne tien manere des aides, mises, ne prises, de notre roiaume ne prendroms, fors que par commun assent de tut le roiaume, sauf les aunciennes aides et prises dues et custumees.*"

The right to grant taxes, which had been continuously contended for since Magna Charta (1215), had at length, after the course of a century, been won, and won, moreover, upon the broad basis of the right of those classes who actually paid the State taxes.

The individual tax-paying groups still for a long while made their grants separately. But from the time of Edward II. the tendency to make the direct taxes correspond in respect of both time and amount became evident. The common interest required a uniform scale. If this was to be attained it was necessary to meet together for deliberation; the King for his demesnes, the barons for their baronies and mediate towns, the clergy for their estates, the knights for themselves and their tenants, the towns for their *communitas*. With a judicious perception of their common interest they now gradually join together; at first the knights and the towns, next the commons and the lords, then all the component elements of Parliament; so that the granting of taxes passes into a form similar to that of the legislation. In 2 Richard II. this relation had become so far consolidated that a *Magnum Concilium* of the prelates and barons declares itself incompetent to grant taxes without commoners. In straits for money the later kings certainly endeavour from time to time to evade

transaction was, with repeated confirmations (1299, 1300, 1301), united with Magna Charta, of which that of the year 1301 is counted as the thirty-second confirmation.

this acknowledged principle, by having recourse to an older special title, sometimes in their character of owners of demesnes, sometimes as feudal suzerains, and sometimes as wardens of ports. But as lords, knights, and towns hold together in defence of their common interests, the attempts all fail, and at the close of the period the guarantee is repeated by Richard III.

To understand the spirit of these grants of taxes the word of Edward I. is of importance which declared that the taxes proposed to be granted were "*for the common profit of the realm:*" that is, he had renounced a portion of his personal rule in exchange for a national taxation, which caused a number of objections to fall to the ground; but in the stead of these there arose the claim of the estates to inquire into the purpose and the means. The principle that all measures for imposing taxes with regard to the extraordinary revenue of the King are in the nature of a compact, has never been given up. The money bills have never been brought into the normal form of the statutes; they never received any formal assent of the King, to whom they were moreover addressed in a formal document, which was subsequently entered upon the Parliamentary records. The last instance of a grant in separate resolutions was in 18 Edward III. In the later protocols both houses were mentioned together, frequently with the remark that a common deliberation had preceded. The old names for the various taxes, *auxilia, scutagia, hydagia, tallagia,* were for some time mentioned side by side; the interests of the tax-paying estates came into manifold collisions; and numerous experiments in taxation were tried.** The landed interest especially from time to time endeavoured to alleviate its heavy burdens of taxation by payments in kind, by poll taxes, taxation according to parishes, and by a progressive income-tax. All these variations, however, are but ephemeral attempts when compared

** The long series of these variable experiments in taxation, down to the close of the Middle Ages, will be found enumerated in the *excursus* at the end of this chapter.

with the established system of English taxation, which blends together at last (1) all land-rates into a general land-tax; (2) all personal rates into a uniform income-tax; and (3) all tolls and indirect taxes into a general tariff; so that the last-named become an appropriate permanent revenue of the Crown, which in later times is guaranteed to the King as a grant for life.

The right of the estates to grant taxes, thus attained, is, indeed, a normal legal creation. The separate rights of the various classes of society amalgamate and become merged in a common and joint consent. Whilst the tax-paying groups in Germany, separated as they are into *curiæ*, only hold together in case of necessity, but then fall asunder, the peculiarity of England lies in the serious and permanent amalgamation of the estates. As lords, knights, and towns acknowledge an essentially similar liability to pay taxes, seeing that they have under a uniform pressure learned the necessity of holding together, there remains to them also the consciousness of their common interest. The great landed proprietors enjoy no exemption from taxation, no judicial authority, no right to represent the taxation of their tenants; therefore it is that England presents to us a phenomenon which was impossible in Germany in the Middle Ages, namely, that of a union of the estates of the realm and the provinces (lords, prelates of the realm, knights, and towns), into a single parliamentary body.

II. The participation of the commoners in the current business of the realm developed itself in the form of **petitions, common griebances, motions**, and **impeachments.**

The discussion of the grievances belonged hitherto, by virtue of their judicial and administrative nature, to the royal council and the great council. They were received by the *receivers*, reported by the *triers* and *auditors*, and referred to the competent department. The mode in which the petitions were sorted, distinguishing those to the "Chancellor," to the "Exchequer," and to the "Justices," corresponds to the division of the departments of State. At least nine-tenths

of the petitions have reference to the administration of law. The commoners for a long time still acknowledged, both in form and fact, that they represented the interests of the tax-paying classes and the country, whilst the office of guarding the legal and administrative organization of the country belonged in the first place to the prelates and magnates. (2ª)

The first appearance of the commoners is accordingly, as recorded in the official language of the time, very modest; "*vos humbles, pauvres communes prient et supplient pour Dieu et en œuvre de charité,*" is a usual formula. The King in council is the active government, as regards the petitions; to him belongs the judicial power, the granting of new legal remedies, the decision of the cases, or their reference to this court or that. In its dealings with the royal government, even the assembly of the prelates and barons in this department appears only as an extended council. The final publication of the resolutions was the province of the council; the memoranda of the proceedings were, like other records of the central government, kept by the clerks of the Chancellor.

But the whole of the Middle Ages is a practical refutation of the theory of an executive power *in abstracto*. The motions of the commoners and the petitions which they recommended, gain with each ensuing generation a stronger stress, which metamorphosed their right of praying into a virtual right of co-resolution. In the background of this increasing power

(2ª) The basis of a long chain of petitions is formed by Magna Charta and its executory statutes, which like a written constitutional document, become the basis of definite demands upon the administration of the realm. The monarchy acknowledges the obligation of carrying out Magna Charta, which had been so frequently repeated, and that not in the way of royal favour, but *ex debito justitiæ*. Of course doubts as to the interpretation of those clauses, with which the council defended with great consistency the necessary rights of the State against extravagant claims, continually arose. The number of petitions gradually increased in a considerable degree. In 1 Richard II., for instance, sixty-nine petitions were presented by the *communitates*, fourteen by the clergy, nine by the city of London, etc. A petition granted formed a precedent, strengthening each subsequent one. In the most important cases redress is made by a new statute, which by its exact phraseology was intended to render the recurrence of the same abuse impossible. A good instance occurred in 20 Edward III., when the complaint touching the commissions of array issuing from the Chancery, and that the King employed the county militia in foreign wars without the consent of Parliament, was followed by the stat. 25 Edward III. stat. 5, c. 8.

there lay the importance of the county and borough property and the power of taxing it, the granting of taxes, the perpetual combination of "complaints and contributions,"—a situation in which it did not very often fail "that a bill was passed in such suitable company." (2[b])

The Commons first of all demand to be informed of the petitions that flowed in from the most various sources. As early as 3 Edward II. we meet with "receivers of petitions" also in the Commons. After the manner of the *Magnum Concilium*, in 12 Edward III., there was also conceded them a share in the appointment of the reporters, although they have no right of decision and no participation in the resolutions of the great council. Their altered position became also gradually apparent in the phraseology of the time. The "*humbles pauvres communes*" are called under Richard II. "the right wise, right honourable, worthy and discreet Commons." The petitioners outside the House now also address their requests to the right honourable House of Commons itself. The custom of presenting private petitions immediately

(2[b]) The actual compelling power, which gives effect to the motions, is the right to grant taxes. So soon as the Commons feel their co-ordination in the granting of the taxes, they follow the example of the barons in attaching conditions to the subsidies. As early as 2 Edward II., a twenty-fifth was granted under the condition that the King should redress eight grievances which were laid before him, which he promised to do. In 18 Edward III. we find similar conditions made, which were frequently repeated in the course of this long reign. In 22 Edward III. three-fifteenths were granted under the condition that for the future no *tallagium*, or compulsory loan, or any other impost should be levied by the King's council without the grant and consent of the Commons in Parliament assembled, and that this should be guaranteed by statute. Still bolder towards a regency, in 2 Richard II., they grant supplies under the condition that the King be pleased to declare in what way the great sums which had been granted for the war had been expended. The answer ran, that there had never as yet been any account rendered of subsidies, but that the demand should be acceded to, without establishing any precedent for the future (Parry, 140). Shortly afterwards, the Lower House received notice that the officers of the Exchequer were ready to present their accounts. At the request of the Commons nine commissioners were appointed to examine into the condition of the revenue, and the disposal of the personal property of the deceased King. In 3 Richard II. they grant a subsidy with the request to the King, that he may be pleased not to convene another Parliament to tax his poor Commons until one year after date ("Parl. History," i. 357). With regard to the presentation of accounts, Henry IV. had, in 1406, again returned the proud answer: "Kings do not present accounts." But in the very next year a presentation of accounts is made to the Lower House, and the victory thus won was never again formally called in question.

to the Lower House, with the desire that the House be pleased to exert its influence with the King, occurs for the first time under Henry IV. Such petitions are now directed sometimes to the King, sometimes to the King in council, sometimes to the King, Lords, and Commons, sometimes to the Lords and Commons, and sometimes to the Commons alone, with the request to use their good offices with the King and the council. The answer to the complaints was generally made known at the close of the proceedings, that is, after the votes of money supplies. The attempts to reverse this were at first frustrated, but finally allowed to prevail in cases of pecuniary distress. The right of being informed as to the employment of the moneys previously voted appeared at an early period almost inseparable from votes of money. A claim of this description is met with for the first time at the commencement of Richard II.'s reign; it was at once granted, saving all precedents for the future, and was repeated in critical times, without, however, leading to a system of periodical presentation of accounts. (2c)

After the growing influence of the Commons had begun to make itself felt, their advice was frequently asked in the general affairs of the country on the initiative of the Govern-

(2c) The order in which subsidies and grievances were to be taken became early a contested point. The council, in proportion to the urgency of the grievances and pecuniary needs, from time to time accedes to the demand made upon it to answer the complaints before taking the vote of supplies. But acts of grace on the part of the Crown are never to be made dependent upon such conditions (5 Richard II.; Parry, 145). Amidst the manifold pressures of Henry the Fourth's reign, and in the further course of the house of Lancaster, the right of the Commons to make conditions for the employment of the subsidies, to demand the presentation of accounts in cases of a particular kind and to summon the officials charged with such presentation, to recommend retrenchment in certain branches of the public expenditure, and to make the granting of fresh subsidies dependent upon the redress of certain national grievances, was established by many precedents (Hallam, iii. 84). The dispute as to the antecedent redress of the grievance was in practice settled thus, that the grant of money was as far as possible put off until the last day of the session. The custom of giving a general name to the grants made for definite purposes dates from the reign of Richard II. and Henry IV. The larger grants were as a rule described "for the defence of the realm"; tonnage and poundage, "for the protection of the coast;" the remains of the old Crown lands were reserved for the expenditure of the household; a portion of the poundage and of the subsidy upon wool for the defence of Calais (Stubbs, iii. 264).

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ment itself. This course often meets with resistance on the part of the Commons, who foresee a grant of money as the consequence of their advice. In 28 Edward III. they declare, with reference to a treaty of peace laid before them, that "what was pleasing to the King and the *Grantz*, would be also agreeable to them." In 43 Edward III., however, they resolve, together with the Lords, that the King may with right and good conscience again adopt the title of King of France; at the same time the renewal of the war was voted, and a subsidy granted. It was consequently declared, after such reference, "that the war had been undertaken with the general consent of all Lords and Commons of the kingdom in various parliaments," from which the central government did not fail to draw far-reaching deductions. In 7 Richard II. the Commons refuse to declare either for war or peace, but assert after much urging that they were more for peace (Parl. Hist. i. 380). The immediate interference of the Commons with the appointment of the royal ministers, on the other hand, and an immediate direction of the proceedings of the government in the council, is only met with as an expression of revolutionary feelings, and always under the guidance of the parties in the House of Lords. In 5 Edward II. they make common cause with the Lords to secure the somewhat violent appointment of the "ordainers" as a regency-council; just as in later times they did when a reaction had taken place to obtain their dismissal. In 15 Edward III. an extravagant petition was presented, the aim of which was the appointment of the justices and ministers in Parliament, and which was in the main acceded to, though under protest of the royal council. Meanwhile by proclamation to the sheriffs, the King, after the close of Parliament, declared the statute that had thus been passed to have been wrung from him against his will, and accordingly null and void, and two years later Parliament agreed to its formal repeal. At the close of the reign of Edward III. and on Richard the Second's accession, the Commons were incited by the personal incapacity of the King to govern, and by those members of

the royal family who were nearest the throne, to actions which exceeded their competence. Under Henry IV. it is the usurpation of the throne which, combined with the speedy unpopularity of the King, produced encroachments; in 5 Henry IV. motions for the removal of certain persons from court; in 7 Henry IV. motions approving the appointment of certain persons of the royal council, and in consideration thereof granting subsidies; in 8 Henry IV. thirty-one articles which positively force the council upon the King. But all such encroachments were neutralized under the same reign. Somewhat different was the co-operation of the Commons in the functions of regency during the minority or lunacy of a king, which, owing to the want of an established regency-statute, devolved principally upon the *Magnum Concilium*, together with a certain co-operation of the Commons, dependent upon power, influence, and party feeling, as well as upon the temporary state of affairs at court. For instance, in 50 Edward III. the Commons recommend that the royal council be increased in order to be permanently near the person of the King, who was in his dotage; which was with certain provisoes agreed to. On the accession of the minor, Richard II., the Speaker moved that eight persons be appointed permanent counsellors of the King; then, later, that the Chancellor, the Treasurer, the great officers and counsellors be appointed by the Parliament. We may also regard as special cases the proceedings on the accession of Henry VI., and on the later regency of the Duke of York. Apart from cases of a personal incapacity to govern, an immediate influence of the Commons upon the members and the procedure of the supreme government always worked badly, and was discarded after a short time.

On the other hand the application of the right of motion to the impeachment of executive officers of the royal council was significant. The Norman administrative law had made the prosecution of crimes, as being a part of the maintenance of the peace, a common duty, and thus formed a communal right of indictment. As the *communitas* of the county brings

its official presentments as public indictments, as after Edward III. the grand inquest became even the regular instrument of indictment, so the *communitates* united in Parliament could not with consistency be denied the right of accusation. As *communitas regni* they begin to make use of this right for the first time in 51 Edward III. (1376), in the manner of a presentment by the county jury. Under Richard II. the accusations became numerous. The power of such an accuser and the high position of such an accused person naturally rendered these cases the subjects of the highest reserved jurisdiction; accordingly they are addressed to the King in the great council, and thus begins the system of impeachments by the Lower House before the Upper House. (2[d]) Proceeding as it did from high quarters, the right of impeachment was, like the right of petitioning, certainly dependent upon the actual balance of power, and was accordingly fluctuating.

(2[d]) The right of impeachment begins in 51 Edward III., in a time of great administrative abuses under a King in his dotage. The great political trials begin as early as Richard II. In 7 Richard II. the Commons petition against the Bishop of Norwich and others, who are made defendants. In 10 Richard II. they determine on the impeachment of the Lord Chancellor, the Earl of Suffolk, who was arrested and afterwards condemned. Shortly afterwards the accusation of the judges takes place, which ends with the sentence of death which has been already mentioned. In 21 Richard II. after a re-action has ensued, they impeach the Archbishop of Canterbury, who was condemned to banishment for high treason. Other lords were put on their trial, by the Lords Appellant and were condemned. At first there alternately appeared also an appeal (private accusation), with proof by duel or witnesses, but this was expressly abolished by Henry IV. The accusation by the Lower House in a body, after the fashion of a presentment of the county jury, is apparently the rule. The ensuing reigns of Henry IV. and V., however, give Parliament no cause to put ministers on their trial; Henry IV. rather gave way with comparative ease to the urgent complaints, by frequently changing his ministers. But under Henry VI. the accusations are renewed, beginning in Suffolk's case in the form recognized by the legislature, *i.e.* by a "bill of attainder," which overrides the customary forms of the judicial procedure. A participation of the Commons in the judicial business of the council and the great council was not as yet gained. In the tumultuous proceedings accompanying the deposition of Richard II., the Commons, as members of the selected commission, co-operated and assented. In 1 Henry IV. they expressly move that they do not wish to be regarded as parties to the sentence which condemned Richard to life-long imprisonment, "as such sentences belong exclusively to the King and the lords." The answer ran that the Commons were petitioners and movers, but that the King and the lords had ever had and should have the right of giving judgment in Parliament; with the reservation that in the statutes that were to be passed, or in grants and subsidies, or in grants for the common advantage of the realm, the King wished to have their advice and consent.

But the advance showed itself most persistent in the transition of the right of petition into a participation in the legislation.

III. **The participation of the commoners in legislation** proceeded from the development of their right of petition. In the cases in which a national grievance could not be redressed by the existing law, and in which accordingly a new ordinance was needed for such redress, the ordinance as a constitutional measure proceeded from the King in council, in more important cases (after Edward I.) with the consent of the prelates and barons in the great council. A consent of the commoners was not yet spoken of; but the petition itself involved the consent of the Commons, and therewith also their previous sanction to the statute that was to be passed. The growing authority of the Commons gradually gives such a value to this virtual consent, that their actual consent begins to be formally mentioned, as was done on one occasion in the last year of the reign of Edward I., and several times under Edward II. These proceedings are repeated, as in the assemblies of notables under Henry II. and III. The mention of the consent, which is at first only made use of as suitable, becomes gradually a claim within a certain range, which is ever becoming wider. The turning point in this situation is the long and financially embarrassed reign of Edward III., in which there was, from year to year, the continual necessity to summon complete Parliaments, in all not less than seventy times. The Commons, who, until then, had been only occasionally mentioned in connection with parliamentary statutes, are from this time seldom omitted—nay, their assistance became more and more frequently mentioned in the preamble to the statutes. The usual style now distinguishes motion and consent; the King issues decrees on motion of the Commons with the sanction of the lords and prelates. The rolls of Parliament prove that in reality the more important statutes emanated from them. From such an initiative to a right of consent there was now only one step. Edward III., embarrassed for money, and anxious to gain a counterpoise

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to the great barons, saw himself at the close of his reign forced to a concession couched in general terms. An express recognition of the right follows in 5 Richard II.

After 1384 no more special summonses were issued, but only general ones for universal national affairs; and there now begins (as in the Lords) the usual dating back of the pretensions of the estates. In a petition of 2 Henry V. the Commons declare it to be the "liberty of the Commons that no statute be passed without their consent; that they have ever been consenting parties as well as petitioners, and accordingly request that for the future nothing be added to or taken away from their petitions." In answer to this, the King assented that they should for the future in no case be bound without their consent (Rot. Parl. 2, Hen. V.). As after Edward II. the dominant influence of the Lords became discernible in the use of the French language in the statutes, so after 5 Henry IV. instances of the use of the English tongue begin to be apparent as symptoms of the growing influence of the Commons. As early as the Parliament of 1362 the use of the English language had been introduced in official transactions. The Parliament of 1365 opened with a speech in English, and was probably also dismissed by Edward III. in English (Stubbs, iii. 478). From the time of Henry VI. it was the custom to bring in the motions at once in the form of a bill. From Henry VII. the right of the Commons to assent was expressed in precisely the same manner as that of the Lords. The preamble of the parliamentary statutes as it stands at present has, however, been only framed since the time of Queen Mary. (3[a])

(3[a]) The participation of the Commons in legislation became matured in the course of about two generations. There is no doubt that under Edward I. only a deliberative voice of the commoners was intended. This was expressed in the form of their summons: "*Ad faciendum quod de communi concilio ordinabitur*" (in 26 Edw. I., 28 Edw. I., 7 Edw. II., and for some time afterwards). In 35 Edward I. the statute of Carlisle contained for the first time the following: "*Dominus Rex post deliberacionem plenariam et tractatum cum Comitibus, Baronibus, proceribus et aliis nobilibus ac communitatibus regni sui, habitum in præmissis, de consensu eorum unanimi et concordi ordinavit et statuit*," etc. But this assent was probably only mentioned in the sense in which in the earliest Norman period an assent of the bishops

Hand in hand with the acknowledged right of the Commons to assent, there became developed under the long reign of Edward III. the legal conception by which the decrees promulgated with the assent of the estates exercise a force of a stronger and more permanent kind, so that what had been ordained by the King with the consent of the Lords and Commons, could not be altered without the consent of all parties. It is the legal logic of the German law, which here again comes into play. If the *jus terræ* can only be altered by ordinance *consensu meliorum terræ*, the common law, altered with this consent, becomes itself again *jus terræ*, which can only be altered *consensu meliorum terræ;* that is now, only with the consent of the Commons. The binding force of the royal right of ordaining is upheld in principle, but the application is limited with respect to repealing former *statuta*. Such an obligation of the King to respect the permanent and fundamental laws of the realm, even though in opposition to his momentary wishes, had been already

and prelates had been spoken of, as a constituent of moral authority for the land. To the constitutional validity the *assensus* was just as little essential as was the unanimity in the resolution which has been mentioned. Numerous events of Edward II.'s reign prove that the council of the prelates and barons was still alone regarded as "the legislative assembly." Since 5 Edward II., indeed, the magnates had thrust the participation of the Commons, except in the province of the grant of subsidies, comparatively into the background. With the reaction, which arose in 15 Edward II., and ended with the execution of the Earl of Lancaster, an ordinance was issued in Parliament, which rejected the exclusive pretensions of the barons, and looked like a concession of a share in the legislation, but which in this connection did not as yet contain such: "*Revocatio novarum ordinationum anno* 1223; *les choses, qui serount à establir, soient tretées accordées et establies en parlaments par notre Sr. le Roi et par l'assent des Prelats, Countes et Barouns et la communalté du roialme.*" The point of this declaration was directed against the exclusive pretensions of the magnates; the King is the legislative authority with the consent of the rest, but not the Lords as such, as had been the case for a series of years, against the will of the King (Rep. i. 282, 283). But the declaration is significant in so far as it is the first express recognition of Parliament as a legislative assembly. Although it admitted as yet no rule as to the matters in which the consent of the great legislative assembly was necessary, yet indirectly it lays emphasis upon the fact that where a consent to royal ordinances was to be given, the *Assens* of the Commons who have been convened, must be as essential as the assent of the lords. Under Richard II. appears shortly the "assent of the prelates, lords, and commons." Under Henry IV. and V., in addition to the assent of the prelates and barons, the prayer of the Commons is again spoken of. But under Henry V. we meet again with the "consent" of the Commons. In 11 Henry VI. the expression "by the authority of Parliament" first occurs (Stubbs, iii. 465).

expressed by Edward the Second's coronation oath. With its more consistent enforcement the strongly conservative feature of the parliamentary constitution came into action, which allowed the royal legislative power to remain intact in its former dignity, but rendered changes in the existing law dependent on conditions of consent which had to be complied with, in the absence of which a mere expression of the royal will was not to be regarded as law. This is so much in harmony with the permanent character of the State, that throughout all the vicissitudes of centuries it remained the leading idea. (3[b])

Upon this basis there now becomes fixed a distinction between the notion of *statute* and *ordinance*, in the phraseology of the laws, of the courts, and of the science of jurisprudence.

(3[b]) The difference between statute and ordinance depends now purely upon the consent of the three estates. If the Introduction to the Official Collection of Statutes, vol. i. p. 32, says that the distinction between *Statuta* and Ordinances has never been sufficiently explained in principle, this is owing to the fact that the *statuta vetera* have a repealing force even without the consent of the three estates. The Anglo-Norman monarchy had formally wiped out the difference in the same way as the period of absolutism in Germany. But in the main point the precedents of this period admit of no doubt. In 14 Edward III. a commission of justices, prelates, barons, twelve knights of the shire, and six burgess-deputies was appointed to hold daily sittings, to decide on the points and clauses in the statutes, "*que sont perpetuels*," and such "*que non sont mye perpetuels*." The revocability or irrevocability thus formed the essential mark. In 15 Edward III. *grantz et communes* petitioned, that petitions which had been granted in *pointz a durer* (in permanent matters) should be granted by statute, and others by charter or patent (Rot. Parl., ii. 113, 132). In 28 Edward III. they approve an ordinance that had been issued, and wish it to be raised to a permanent statute, whereupon it was entered as such upon the statute roll. In 37 Edward III. the King inquired of both Houses whether they wished the resolutions that had been framed to be promulgated in the way of an ordinance or of a statute. They replied: In the way of ordinance, "in order that they might be amended at their pleasure." In 51 Edward III. a petition involving a principle is presented—that the statutes which had been made in Parliament should not be annulled, but with the common consent in Parliament. Answer, "That they could not be otherwise repealed." And further, a petition follows on this, to the effect that no statute or ordinance shall be granted on petition of the clergy, but with the consent of the Commons. The reply was, "*Soit ceste matir declaré en especial*" (Parry, 137). In 1 Henry VI. the Clerk of Parliament was ordered to show certain resolutions to the justices of the two courts, that they should take cognizance of such as were statutes of the realm, and should duly transcribe such (upon the statute-roll) for the later cognizance of the Lords, and for publication. The copies of the other Acts concerning the administration of the lords of the council and of the realm, were to be sent to the clerk of the council, recorded in writing, and registered in the chancery in accordance with custom (Nicolas, iii. p. 6).

From the time when Henry II. and III. had issued important royal ordinances with the consent of the assembly of notables, the more solemn statutory enactments had begun to be distinguished from the simple royal decrees as "assizes." The laws of this time are agreements of the King with all three estates of the realm—prelates, barons, and commons; statutes in the sense of laws by mutual accord in the form of parliamentary enactments. With 1 Edward III. English jurisprudence begins the so-called *statuta nova*, the co-operation of the three estates becoming from this time more regular. These are cited as parliamentary enactments with continuous *capita*. The older ordinances of equal validity issued since Magna Charta (*statuta vetera*) were applied as laws, without inquiring further into the character of the legislating authority.

Connected herewith is the commencement of the framing of the statutes. Under the system of personal government, single decisions, temporary administrative measures, and permanent ordinances were all confused together. Frequently petitions that had been granted lay inoperative for years before the enactments affecting the same were carried out or published. As a rule, at the close of the parliamentary sittings, the council sorted the confused mass of resolutions, and provided for their being duly carried out. It was specially the business of the justices to select such enactments as, being of a permanent nature, should be entered upon the "roll of the statutes" for the cognizance of the courts. But after the right of the estates to participate in the framing of enactments had become established, they further demanded to participate in this selection. In the Parliament of 14 Edward III. a number of prelates, barons, and counsellors were appointed, together with twelve knights and six burgesses, to formulate such petitions and decrees, and to direct the drafting of such as were suitable for permanent statutes (cf. 15 Edward III. c. 7). (3[c])

(3[c]) The formal framing of the statutes still devolves, by virtue of the constitution, upon the continual council. The actual *statuta* were down to Henry

More than once the King himself, after this time, inquired of the Commons whether certain grants should be carried out by way of "statute" or of "ordinance," to which they replied, that the latter method was preferable, because the requisite alterations could then be more easily made. Hence, in parliamentary phraseology, a distinction arose between two classes of statutory acts:

(i.) *Ordinances* and *proclamations*, that is, decrees which were issued by the King in the old manner on his own authority; as a rule with the advice of the council, and sometimes also with that of the great council.

(ii.) *Statutes*, which having been agreed upon in the new manner with the three estates, were, as being permanent enactments of the realm, entered upon the statute-roll and published.

In the current business certainly the old confusion continues. Single decisions and resolutions touching administrative measures, motions, petitions, proposals for grants of royal favour, creation of peers, etc., were confusedly entered upon the parliamentary roll, often with mention made of the assent of the House, without being on that account enforceable as laws, or being published as such. They were rather rendered executory by means of charters, patents, and administrative decrees, or were not enforced or were modified, so that the special character of the enactment was frequently not perceived until later appeals from it were made. In like manner, also, in their legal effect the co-ordinate position of the ordinances remains intact. Royal charters and ordin-

the Sixth's reign only issued by the justices after the close of the sittings, yet with the proviso that no new addition should be made to them, which was on motion of the Commons in 2 Henry V. again expressly guaranteed. But the question of the framing diminished in importance under Henry VI., after the Commons began to introduce their legislative motions in the form of bills (as *petitio formam actus in se continens*). When these had passed *mutatis mutandis* through both Houses, the King found himself in a position to either accept or reject them without further clauses, which gradually became the rule in the course of Henry the Sixth's reign (Hallam, iii. 92). Private petitions also, which were introduced through the medium of the Commons, often passed into the form of statutes, through the consent of the Lords and the King, and formed from this time forth "private bills," which under Henry V. and VI. already fill a portion of the parliamentary rolls.

ances binding upon the magisterial departments exist side by side with the statutes. The civic rights, the municipal summonses to Parliament, and the later charters of incorporation conferred upon towns are further instances of the continued existence of this decreeing power, which, with regard to its derogatory power, is only restricted by the principle that what has been agreed to by statutes passed by the three estates of the realm can no longer be repealed by simple ordinances. The overstepping of these limits was in aggravated cases to be punished by the right of impeachment residing in the parliaments.

IV. This development of the rights of the Commons led of itself tacitly to a **division of the whole Parliament into two houses.**

This was primarily a consequence of the position towards the Crown and of the long-standing ascendency that the House of Lords had attained, at a time when the Commons were only associated with it to a very modest extent. Resolutions touching war and peace and international treaties, the direction or command of the armed forces on sea and land, the right of direct or indirect taxation, the judicial and police power, offices, charters, franchises, and liberties, as well as every magisterial authority, were all centred in the Crown: "*omnis libertas Regia est et ad coronam pertinet*" (Parl. Writs, i. p. 383). To this royal right the parliamentary right of the magnates to participate had been added. The Crown was obliged to rely upon their willing and energetic co-operation in all matters for which the traditional and fixed revenues of the Crown, or its ordaining power under the clauses of Magna Charta, no longer sufficed. The great council became accordingly intimately bound up as a co-factor with the central government in all its powers, acting—

1. As the supreme court of the realm.
2. As a tax-granting assembly.
3. As the highest deliberative assembly in the realm.
4. As a legislative assembly.

In the first division of these functions, elected deputies

could not, according to the traditional judicial constitution, take any part.

On the other hand, their right of granting taxes was bound up and intimately corresponded with that of the prelates and barons, and became even predominant in the course of this period.

On that very account their participation in deliberations concerning petitions and statutes became more and more essential, as also in certain cases a co-right of resolution touching the business of the supreme administration of the realm.

The limits which the participation of several hundred elected and changing deputies in the business of State could really attain had to be learnt gradually by experience. In spite of the comparative equality of their legal basis, the two great elements of Parliament were not fitted for voting according to heads and majorities, a proceeding which was certainly not contemplated when the commoners were first convened. Even when a vote was taken on the subsidies, persons who paid taxes in respect of their own demesnes could not be placed upon the same footing with those who recorded their vote as representatives of a county or a municipality. Such a confusion of the tax-paying assembly was manifestly against the interests of both parties. There arose further a division in the formal conduct of business, owing to the fact that the Commons in the first generations were only regularly convened "*ad faciendum quod de communi concilio ordinabitur.*" After they had made their appearance, in whatever form they might be received, the lords and prelates retired to the council chamber and left the commons alone together. (4ª)

(4ª) The division of Parliament into two houses primarily arose from the fact that the council of the prelates and barons had, two generations before, attained constitutional rights by precedents, whilst the commoners had now first to acquire such rights for themselves. The writ of summons "*ad faciendum, quod de communi concilio ordinabitur,*" expresses definitely enough this position of an extraordinary element with a purely deliberative character. So soon as the King had, at the commencement of Parliament, received the whole of the members either personally or by his commissioner, a division took place, *ipso facto*, in that the *Magnum Concilium* withdrew for deliberation, and the commons remained alone to wait for the issue of the previous resolutions, which were then communicated to them for

But those remaining behind found themselves, after the close of a generation, already united in the feeling of their corporate unity. In exercise of the right of granting taxes, the representatives of the shires began to regard themselves as the indispensable complement of the baronage, and as the result of that summons of the lesser barons, which was required by Art. 14 of Magna Charta. Hence they refuse to deliberate on taxation in any other manner than in their collective capacity. The municipal plenipotentiaries follow the same example, and also do not enter individually, but only in a body, upon the deliberation of taxation. Again, the urgent and common tax interest brings together the knights of the shire and the burgesses. The *gentz de la commune*, who had been left behind by the great Council, were obliged to regard themselves as a second *corpus*, in which the precedence was conceded to the knights of the shire. The right of granting taxes, which had been formally conceded in 25 Edward I., and which was to reside in the *tota communitas*, as well as in the prelates and barons, in like manner led to the elected representatives regarding themselves as a *communitas*, and desiring to be treated and being treated as such. As early as 8 Edward III. we find a deliberative meeting at which the knights of the shire and the *gentz de la commune* come together and return a common answer. In 13 Edward III. the *gentz qui sount cy a Parlement pour la commune* give a special answer and one at variance with that of the great council. In 25 Edward III. a deliberation of the Commons in the chapter house is spoken of; and from that time the assemblies of both parties are manifestly held in different places. Both bodies transact business separately with each other and with the King. In 57 Edward III. the

the expression of their opinion or their assent. This is the external condition of things which still continues through the century of the three Edwards. In 33 Edward I. the representatives of the *communæ* were dismissed at the close of the principal proceedings; the prelates, barons, justices, and others were to remain behind and still form the proper Parliament. In 3 Edward II., for example, enactments in "full Parliament" are spoken of, although no deputies were summoned to it at all. In 4 Edward II. a "full Parliament" is spoken of, after the representatives of the shires and towns had been dismissed (Peers' Report, i. 267).

first Speaker of the Commons is mentioned, who delivers the general declarations of the House. Under Richard II. they exist as a corporate body; and on his deposition are an acknowledged limb of the estates of the realm as then established. (4[b])

After the usurpation of the house of Lancaster the throne was no longer founded upon the right of birth alone, but upon the recognition of Parliament. Hence there comes a time of

(4[b]) This institution was brought about by the series of precedents under Edward III. In 6 Edward III. it was laid down that the clergy deliberates for itself, the earls, barons, and other *grantz* for themselves. The ordinances which had been proposed (for the maintenance of the peace) were approved by the King, the prelates, earls, barons, and other *grantz*, and by the knights *et gentz du commun*. But thereupon the Commons and the clergy are dismissed; the prelates, earls, barons, and *gentz du conceil du Roi* remain behind, as the King requires their advice on important matters (Peers' Report, i. 304). In the following Parliament, 6 Edward III., the prelates deliberate alone; the earls, barons *et autres grauntz* alone; and the knights of the shire alone. Then the money grant is taken; prelates, earls, barons *et autres grauntz*, and then the knights of the shire *et tote la coe* (Report, App., iv. 411). In 13 Edward III. it was resolved by all *auxi dier as grantz come as petitz*, that the King was to be supported by a large grant. The commons (*les gentz qui sount cy à Parlement pur la commune*), however, desire first of all to deliberate with the *communitates* of their counties, as the question was one of a large grant (Report, iv. 501). In 17 Edward III. prelates, lords and commons first meet together in the Chambre de Peynte; on the following day the prelates and the *grantz* assemble for deliberation in the Chambre Blanche. The knights and Commons "attend upon the prelates and lords" and "give their reply by William Trussel" (Parry, 114). In 25 Edward III. the King assembles the *grantz* in the Chambre de Peynte, and the chief justice explains the reason of the summons. On the following day the Commons also appear, and the chief justice, "on the opening of Parliament," directs his address particularly to the Commons. To shorten the period of their labours, he proposes that they shall choose twenty-four or thirty from among their number to go to the King in the Chambre de Peynte, and that the King be pleased to send some of the *grantz* to them to confer with those who had been thus chosen, whilst the rest should assemble in the Chapter House, Westminster. The Commons refuse this proposal, and, on the contrary, appear *in corpore* before the Prince and the other *grantz* on the following day. From this time opening speeches before the whole assembly occur more frequently; in 36 Edward III. for the first time in the English language (Report, i. 327). In 39 Edward I. the Commons remain behind after the opening in the Chambre de Peynte; the King retires with the prelates and the lords to the Chambre Blanche, and declares to them specially what had been previously uttered in a general address to them and the Commons. The Commons were then again admitted and specially informed on the same subject, and their counsel requested (Parry, 129). In 50 Edward III. the Commons retire to their "accustomed place," the Chapter house (Parry, 134, 135). In 51 Edward III. the first Speaker of the Commons is mentioned, "*Sir Thomas Hungerford, avait le paroles pour les Communes d'Engleterre.*" The Speaker makes general declarations in their name. Yet his title is still varied; in 1 Richard II. "*Qui a la parole de par la Communité*"; in 1 Henry IV. "*Parlour et Procuratour*; in 9 Henry VI. "*Parlour commune.*"

mutual recognition of the conditions which had arisen from these events, and hence also that of a clearer exposition of its functions, which finds expression in the Parliament of Gloucester, 9 Henry IV. It was there demanded of the Commons that they should send twelve members to report on the questions propounded and to give an answer. They protested against this on the ground that it was incompatible with their liberties, and accordingly the famous Declaration of Gloucester was issued (Rot. Parl., 9 Henry IV. p. 610).

This declaration takes for granted the old position of Parliament as a royal council. It follows that the King may be present in the great council of his prelates and barons; and this is tacitly reserved, except in the case of money grants, which, proceeding as they do from the free will of Parliament, may not be hampered by the personal presence of the King; and in this respect the Commons have now acquired a precedence so that the Lords accede to the grant of the Commons and not *vice versâ*. This constitution of the two Houses of Parliament, at length completed, is henceforward also conspicuous in the style of the proceedings, as in 28 Henry VI., when the Chancellor prorogued the sitting "in the presence of the three estates of the realm." (4[c])

(4[c]) Evidently the long reign of Edward III., with its frequent demands for subsidies and its frequent parliaments, had given the commons a sure feeling of their independence (Peers' Report, i. 335, 336). They had in this half century advanced about as much as the prelates and barons in the half century under Henry III. In 5 Richard II. an order of attendance was issued for the whole Parliament. In 2 Henry IV. the procedure already moved within the broad lines of the relation now subsisting between the two Houses (Report, i. 305). In the stat. 7 Henry IV., touching the devolution of the crown upon the eldest son of Henry IV., the commons were described as *Procuratores et Attornati* of all counties, towns, and of "the whole people of the kingdom," and the enactment passed as having been passed "*per Universitates et Communitates*" of the above-mentioned counties, towns, and "the whole people of the kingdom, legally constituted according to the style, manner, and observance of the realm" (Report, i. 355). From Richard II.'s deposition evidently dates the idea of regarding the prelates as the first estate of the realm, the temporal lords as the second estate of the realm, the deputies of the counties and towns as the third estate, who in this form are the representatives of the whole people (Report, i. 357). The altered character is shown also in the longer duration of Parliament, which in 8 Henry IV., with sundry prorogations, lasts almost a whole year, to the great grievance of the country, by reason of the daily salaries that had to be paid.

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The Commons from the first claimed freedom of speech in Parliament, as a matter of course; that is, they were not to be responsible for their motions and debates to the servants of the Crown *pro tempore*. This was a natural result of their position as members of a supreme council of the Crown, when in private deliberation. When party passion in 20 Richard II. had brought about Harley's condemnation in consequence of an obnoxious motion in the Lower House, his sentence was delayed on the motion of the prelates, and was shortly afterwards declared null and void, as incompatible with the usage of Parliament. (4[d])

V. Finally, from this process of formation arose also the active and passive **rights of election and qualification for the Lower House.** That these rights of election did not become the subject of legal declaration until after the lapse of a century, is explained by the fact that Edward I. issued the first summonses of his own personal choice, and that the Commons were at first only considered as deliberative estates, as well as by the fact that the concession of taking their consent to the taxes was only made later, and then intentionally in a vague form including the whole *communitas*. As, by custom of Parliament, the summons by royal writ was hitherto considered sufficient to cause all the vassals of the Crown to be represented for the purpose of their money grants, it was consequently considered a prerogative appertaining to the King to decree by writ whether and how the counties and towns should be summoned so as to form supplementary tax-granting and deliberative assemblies. The character of the summons indeed changed very slowly. The determining of the bodies to be summoned, and of the active and passive

(4[d]) Hallam writes appropriately on this point (iii. 102). "No privilege of the Commons can be so fundamental as liberty of speech. This is claimed at the opening of every Parliament by their speaker, and could never be infringed without shaking the ramparts of the constitution." Once in the later period of Henry the Sixth's reign, a complaint occurs as to Thomas Young, who was confined in the Tower for a speech made in the Lower House. This incident, too, was disavowed in later parliaments, and has been probably omitted in Hatsell's Precedents, because it took place in the disorderly times of the wars of the Roses that were then beginning.

rights of election, runs parallel to the gradual formation of the hereditary estates of the realm; and even after the bodies had become consolidated the prerogative of adding newly created boroughs still remains.

In the summons of the counties this arbitrary character shows itself also in the varying number of the knights they were to send to Parliament. In 18 Edward I. the sheriffs were ordered to send two or three knights *de discretioribus*, in which arrangement a voting according to majorities was evidently not as yet contemplated (Report, i. 197). But in consequence of the daily allowances to be paid, the smallest representative number of two became early the customary one. In 28 Edward I. "three knights or others" were summoned to a discussion touching the carrying out of the provisions of Magna Charta. In 29 Edward I. and 5 Edward II. the order was issued to send the same knights and the same burgesses that had been elected in the last Parliament. As a rule, however, on every prorogation new writs were deemed necessary, and when these new writs were issued, the number of those summoned often again varies from the preceding one (Parry, 70). In 26 Edward III. the order was issued to send only one knight from each shire, because of the harvest. In 11 Richard II. the sheriffs were commanded to send such loyally disposed knights as were "*in debatis modernis magis indifferentes;*" the clause was, however, withdrawn as being "*contra formam electionis antiquitus usitatæ et contra libertatem dominorum et communitatum,*" etc. (Parl. Hist., i. 410). From that time the number of knights of the shire was definitely fixed at two, and in like manner the number of counties to be thus represented at thirty-seven. Chester and Durham were still excluded as being Counties Palatine. Lancaster retained its two deputies, as it had already exercised this right before its elevation to a County Palatine. In 15 Edward II., on one occasion, twenty-four representatives were summoned for South Wales, and twenty-four for North Wales, but this summons was not repeated under the same reign, and was in later times only occasionally renewed.

For analogous reasons there was for a long time no mention of a legal limitation of the electoral body. When Edward I. summoned his faithful Commons for the first time, they were existing corporations who, according to law and custom, had certain military, legal, and police services to perform, and had to raise from among themselves certain taxes. It was accordingly understood that these bodies were summoned in the manner in which, in accordance with the constitution, they discharged their public business in their county court, to which the towns had originally to send representatives in the persons of twelve burgesses. The formal election of the municipal members took place in the county assembly, and the report as to the result of the election was included in the same document as that touching the election of the knights of the shire. The election *in pleno comitatu* included also the boroughs as outlying districts, just as, from time immemorial, had been the case in the Norman administration, where the burghs had been regarded as "special farms" in the *comitatus*. Probably a deputation of the burgesses from the several cities either notified to the sheriff the election they had made, or they reported to him the election which had previously taken place in the municipal assembly. The latter course was probably the rule in towns with a comparatively organized municipal constitution (Stubbs, iii. 414). The voting in the county assembly was naturally regulated according to the suit of court. The judicial system had certainly from time immemorial been identical with the civil constitution. The deputing of two knights appeared as one of the many transactions which could be undertaken by the county assembly in the same manner as other business; of course "*in pleno comitatu de consilio et voluntate eorum de comitatu*" as is expressed in a writ of 4 Henry IV.

The county assembly of those times, however, when compared with that of the former period, appeared in a somewhat decayed state. The *placita coronæ* had been taken from it, and now followed another course. Suitors could still act in civil actions; but the competition of the central courts and

the itinerant justices had also encroached upon this jurisdiction in civil matters, and confined it to the less important cases. The periodical county courts were accordingly only occupied in general with taxation and military business, and with other matters of an administrative nature, and were therefore only poorly and irregularly attended; the court was in fact a district assembly, at which, in accordance with other analogies, the knighthood had almost exclusively the power to dictate, and most matters were settled more by acclamation than by a formal vote. The really burdensome suit of court had meanwhile passed to the civil assizes, with their juries composed of knights and forty-shilling freeholders; in criminal matters such suit had likewise passed to the assizes of the itinerant justices with their presentment and petty juries, formed out of the hundred. After the middle of the fourteenth century there were added to these the grand jury, for the most part composed of landed proprietors; and the office of justice of the peace was occupied by almost the same class. The suitors, who were now summoned in the character of jurors, were, however, no longer summoned as such to attend the county court. Failing special instructions, the sheriff could give notice to all freeholders, and summon such as were bound, as suitors, to suit of court. He might only summon his special friends, or might give notice to no one in particular, so that the election took place in the presence of a few who were by chance present. "The subject is obscure, and the customs were probably various" (Stubbs, iii. 406 *note*). However, this obscurity was unmistakably favourable to the influence of the sheriff and the smaller groups of the great landed proprietors. Complaints were made that the elections were often held by only a few magnates, and frequently by the sheriff at will; sometimes, by reason of riotous proceedings, no election was made at all.

Such an incongruous form of the electoral body might be disregarded, so long as the summons to Parliament appeared as a burdensome duty thrown upon the tax-payers. It was not until the rule of the house of Lancaster that the real

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situation of affairs attained its final settlement after still more important party struggles; and at the same time appeared those statutes which were natural at such a juncture. By 7 Henry IV. c. 15 it was ordered that arbitrary and partial action by the sheriffs should cease, and that in the county court next held after receipt of the writ, the election act should be proclaimed in full court, and performed by all present, alike by those suitors who had been specially summoned, as by all the rest of the suitors who were present on the occasion. The sheriff was to draw up a document, to which should be affixed the seals of all who took part in the election proceedings. The document was then to be attached to the election writ, and sent into Chancery as the official return of the sheriff; and the Crown was to be thus enabled, by examination of the document, to ascertain what persons took part in the election. In the draft of the bill there was contained a further clause, which provided that in the writs addressed to the sheriffs there should be contained instructions for the making of a proclamation in all market towns to the place of election, before the day fixed for such election. But although sanctioned by the King, and resolved by the council, this clause was omitted from the statute itself—hardly by accident!

Shortly afterwards, certain provisions were made touching the settlement of election disputes. An Act of Parliament of the year 1410 (11 Henry IV. c. 1) gave the justices of assize the right of scrutinizing every return, fining the sheriffs £100 for violation of the law, and declaring the daily allowances of such members as had been unduly elected, forfeited. A later statute, 6 Henry VI. c. 4, allowed the sheriff and the knight of the shire, on being accused, an appeal against the decision of the justices of assize. Touching the validity of the election itself, it appears that the King himself "in council," or with the advice of the justices, finally decided the matter. A claim of the Lower House to exercise this right was only expressly raised in the year 1586, and even in 1604 the question was acknowledged as a disputed one between the Lower House and Chancery.

Meanwhile the uncertainty and incongruity of the participation in the county assembly had continued. As a matter of right all *liberi tenentes* who were, according to the old judicial system, summoned as suitors, even though only as supplementary suitors, were entitled to take part in the proceedings. As a matter of fact, in ordinary times only a very small number availed themselves of their right. But in case such an election was expressly announced, or made publicly known, or in case a great question of the day was involved, mass meetings were held of the common people, who did not take part in the active service of the jury, but only appeared *ad hoc*, and who seemed in consequence "unknown" common people to the freeholders who customarily attended. Such was the actual condition of affairs as described in the preamble to the statute which was now passed. In consideration whereof, and in conformity with the old principle, that only those who participated in *scot and lot* should exercise a right of this kind, it was enacted in 8 Henry VI. c. 7 that for the future only freeholders of forty shillings yearly income should take part at elections; according to 10 Henry VI. c. 2 only forty-shilling freeholders within the county. Thus the right of electing is again traced back to the normal principle of service of court, which had been for more than a generation limited on the same scale as the service on juries.

The same fundamental idea is also instrumental in determining the qualification of the elected. It was first of all declared in c. 1 of Henry V. to be a matter of course that the elected as well as the electors must both be resident in the county, as it was the county community that was summoned as such to choose its representative. But, as it was a question of an assembly of the *meliores terræ*, it was at first regarded as a matter of course that knights of the shire should be elected, although no difference was observed between Crown and mesne vassals, for the reasons already explained. But since a great number of the tenants of knights' fees were wont to refuse to take up their knighthood, and preferred to pay the dues for default, at an early date

esquires (*valetti*) had to be deemed sufficient for the office, and the sheriffs were accordingly instructed to see that *milites seu alii de comitatu* were elected (for example, in 1322). As early as the year 1325 there were among the knights of the shire only twenty-seven who had actually received knighthood. Yet the description *duos milites gladiis cinctos magis idoneos et discretos* continued to be long employed in the writ of election; which designation, however, in practice included the esquires. The actual practice was accordingly declared law, by Henry VI. c. 15, which provided that only notable knights should be chosen, and such notable esquires and gentlemen of the county as could become knights, but no yeomen or men of lower rank than these—which is almost in accordance with the qualification for the office of justice of the peace; indeed, in this period the *custodes pacis* regularly appear as knights of the shire, and *vice versâ*. This principle remained in force for four hundred years. (5[a])

The selection of the municipal elective bodies remained, by reason of the variety of these conditions, perfectly discretionary for a whole century. Under Edward I., one hundred and sixty-five cities, towns, and boroughs, were successively

(5[a]) With regard to the mode of electing the knights of the shire, in 9 Edward II. *milites electi in pleno comitatu* are mentioned. In 50 Edward III. it was enacted that the knights be chosen *communi assensu* of the whole county. This appears to be the first declaration of the kind (Rep., i. 329). Then follows in 7 Henry IV. an express ordinance touching the elections in *pleno comitatu;* in 1 Henry V., touching the residence of the candidates for election; in 8 Henry VI., touching the qualification of the county electors; in 24 Henry VI., touching the notables to be elected in the counties. From that time (1446) the qualifications of the electors were expressed in the writs in accord with the letter of the ordinances. According to the stat. 7 Henry IV., the number of the electors signing the return is remarkably small. The number of those affixing their seals is frequently only twelve, sometimes only six, and in great counties only twenty-four or thirty, seldom more than forty (Stubbs, iii. 408). What and whom the knights of the shire properly represent appears at first doubtful. The expressions used about the middle of Edward the Second's reign tend to prove that they were regarded as fulfilling the clause of Magna Charta touching the collective summons of the lesser barons (Rep., i. 277). The endless disputes as to the daily allowances show us how confused the conceptions of representation still were, and how they became still more confused in consequence of the dispute on this point (Rep., i. 336–338). It was only during the course of the fifteenth century that, owing to a more regular usage of the daily allowances, and to the declaratory statutes, matters became uniformly settled.

summoned to Parliament; at first, in 1283, twenty-one; in 1295, ninety-four more; in 1298, twelve more; in 1299, one more; in 1300, nine; in 1302, nine; in 1304, thirteen; in 1306, six more. This list is drawn up from the parliamentary writs. According to Prynne, however, only one hundred and seven cities and boroughs really chose and sent members to Parliament. In the years from 1382 to 1454 the average number was ninety-nine (Stubbs, iii. 448). No other principle can be here perceived than that those cities were summoned which were liable to pay imposts to the King, and whose *tallagia* were originally assessed by the sheriff, and in later times by the itinerant justices. To avoid never-ending appeals, the more important were at first selected, and the summons was gradually extended to all towns whose *tallagia* were of importance to the Exchequer. Those which sent no deputies, after summons had been issued to them, were regarded as consenting. The chief reason for the very unequal distribution was probably that places which were important for maritime commerce or manufactures were especially preferred. A not unimportant consideration was also the greater or lesser distance from London. The important fact was that the towns, as a portion of the county, were ordinarily assessed only at one-fifteenth, whilst, as boroughs in the narrower sense, they were assessed at one-tenth. Other irregularities in the summons also appear. Occasionally the writ was issued directly to the mayors; but as a rule to the sheriff, who thereupon gave his further orders to the municipal authorities, and in so doing was wont to allow himself various kinds of licence. In 34 Edward I. one or two burgesses were summoned from each town in proportion as the borough was larger or smaller. As late as 26 Edward III. a summons was issued to the mayors and bailiffs of ten towns to send only one deputy because it was harvest time. The Cinque Ports were, down to Edward III., only occasionally summoned, and then for special business (Report, i. 215). In later times, too, we meet with certain fluctuations in the number of representatives, two, three, or four, especially for

London and the Cinque Ports. It was not until the Lower House had become more firmly consolidated as a corporate body with its own Speaker, that the number of the representatives became fixed at two, and the number of the regularly summoned and represented towns became more permanent. At the close of Edward the Fourth's reign the number of towns was one hundred and twelve with two members from each. For London, after several fluctuations, four members were summoned after 1378. (5[b])

The House of Commons consisted, then, at the close of the middle ages of the following elements:

1. Seventy-four "knights of the shire," as representatives of the thirty-seven counties, chosen from the knighthood with the concurrence of all land and freeholders bound to serve on juries (forty-shilling freeholders);

2. In addition to these, and as yet somewhat subordinate to them, at least two hundred deputies for more than one hundred cities and boroughs, elected in legal theory from among the burgesses paying scot and bearing lot, but in reality only from a smaller committee, namely, the body charged with conducting the civil and police administration.

VI. **The Parliament as a whole**, that is, after the addition

(5[b]) In 40 Edward III., and in later times still more frequently, small towns make complaint touching the representation demanded of them on account of the higher assessment and costs (Report, i. 327). The contributions to the daily allowances of the representatives also furnished a matter of dispute to the towns. Occasionally, in addition to the ordinary parliaments, there were still more special summonings of civic deputies, as a rule merchants, to discuss regulations which specially concerned the seaports and trade, as in 10 Edward III., and then again in 10, 11, 13, 14, 16, 17, 19, 21, 23, 30 Edward III., etc. In 10 Edward III. this was called a *colloquium speciale* or *personale*. But with the advancement of the Commons to the position of enacting assemblies, such special deliberations die out. The method of election in the boroughs was left to the very diversely fashioned municipal constitutions (Gneist, Gesch. d. Self-Government, 196 *seq.*). Sketches of the customs of individual boroughs at the election of their representatives are given by Stubbs (iii. 416–421). It follows from what he adduces that the question was regarded as dependent on local regulations until the following period, in which the elections and the scrutiny were claimed as being the right and duty of the House of Commons. Of the ordinances affecting the rights of election only the stat. 1 Henry V., touching the residence of the candidates for election, is applicable to the boroughs. "Die Geschichte des Wahlrechts zum Englischen Parlament" (Leipzig, 1885), by L. Piers, is a clever essay on the whole subject.

to the *consilium* of the magnates of the *gents de la commune*, now forms a most extensive and supreme *consilium regis*, the leading features of which, as the "highest royal council," have been retained in the whole as well as in the several limbs. The King remains the *caput, principium et fons parliamenti.* He alone summons, opens, and closes the parliaments, the sittings of which are, as a rule, of short duration. An exceptional session of one hundred and fifty-nine days occurred in 1406; such a duration had been until then unheard of, and this session was felt as a severe burden in consequence of the daily allowances which had to be paid. For his daily salary, from about 7 Edward II., the county representative received as a rule four shillings, the town representative two shillings. But all deputies were soon regarded not only as representatives of their corporation, but as representatives of the whole country, an idea early founded upon the writ of summons *ad faciendum et consentiendum.*

As a fact, this *parliamentum* represented an organic combination of State and society, such as no constitution of estates on the Continent (in consequence of the different development of the feudal system and property interests) could attain to. The firm coherence subsisting between the magnates and the active political government of the realm had been brought about by the formation of the *Magnum Concilium;* that between the magnates and the knighthood by the established form of the county constitution, especially by the office of justice of the peace and the formation of a military force; that between the knighthood and the cities by the county constitution, the unity of the judicial system, the suit of court, the tax-paying interests, etc. The single defective point is in the unequal representation of the boroughs, and a want of coherence of the boroughs among themselves, whose spontaneous and varied organization much resembled the urban constitutions of Germany. This caused them to assume a subordinate position in Parliament, in spite of the far greater number of their representatives.

Yet, in spite of an often actually preponderating power in

the Parliament, the formal subservience of the *Consilium Regis* to the person of the King remains unchanged. Under Richard II. it happened at a time of tumult that a parliament threatened to dissolve. But a threat that a parliament would convene itself without royal summons, or would sit permanently, or continue in permanent committees, or appoint and bind by oath its own officials (after the manner of the German provincial estates), never occurs during this period. Very valuable information on a series of details in the parliamentary mode of procedure has lately been furnished by the investigation of Stubbs (Constitutional History, vol. iii. c. 20, "Parliamentary Antiquities").

NOTE TO CHAPTER XXV.—**The development of the Parliamentary system of taxation** is based upon the gradual blending of older modes of taxation. It is accordingly advisable to review once again the groups that were made subject to the taxes, with regard to their respective interests in the taxation. A valuable aid for this purpose is furnished by the compilation of all parliamentary money grants from Magna Charta down to the close of this period (altogether about one hundred and thirty annual grants) in Stubbs's Constitutional History (vol. iii., Index *sub. v.* "Taxes").

1. The *Crown vassals* had been for generations accustomed to pay scutages in lieu of personal military service. But if this was to be converted into a periodical tax for national necessities, it might be objected that the old feudal tax indeed placed all the knights' fees on an equality with each other, but that in reality the incomes were different and became ever more unequal. The *scutagia* accordingly were not fitted for a normal land-tax. If the scutages under Henry III. had become the ordinary scale for the money grants, this was attributable to the habit of adhering to the old registers. The knights' fees could not permanently escape a rectification of their valuation, that is, an assessment according to the present productive value, like all other landed properties. At the commencement of the reign of Edward II. such a valuation was made, and from that time the landowners in the counties were, as a rule, assessed proportionately. But Coke's assertion is not correct that after 8 Edward II. no *scutagium* at all was any longer raised; in the course of the fourteenth century this course was adopted several times in cases where the King in person took the field, for the last time apparently in 1386. In like manner an aid for knighting a son, and a dowry for a princess on the marriage of a royal daughter, continued to be exacted as a financial resource (Stubbs, ii. 522).

2. The tax-paying group of the *under-vassals and landed freeholders* stood in a relation which early brought them into union with the lower Crown vassals. The sub-vassal had originally to pay his *auxilia* and *scutagia* to the mesne lord, as often as the latter had to pay his to the King. But it was to the interest of the Crown rather to have the tax paid immediately by the tax-paying subject. From this inclination proceeded the statute Quia Emptores, 18 Edward I., which made every new purchaser of a fief an immediate vassal, that is, an immediate tax-payer. The whole of Edward the First's reign shows a constant tendency to abolish, in the interest of the Crown, the difference between mediate and immediate vassals (Peers' Report, i. 248–250). All freehold estate in free socage was by custom considered liable to the *auxilia* in cases of honour and necessity

(Rep., 322). Accordingly, so soon as the *auxilia* had been made the basis of taxation, a fairly uniform scale was attained for the whole of the provincial freehold estates. (Remarks as to the other varieties of tenures and aids are contained in the Peers' Report, i. 274, 275.) An impediment to a good understanding on this point appeared after the introduction of parliamentary elections, by the high allowances of the county representatives. The sub-vassals could object that they were represented by their mesne lords; but as that feudal relation more and more recedes, this difficulty is accordingly tacitly though slowly put aside. On the other hand, in the class of the petty freeholders, disputes are continually recurring. The more representation became developed, the more did contribution to the allowances become a chief characteristic of the tax-payer who was entitled to the suffrage, and on the other hand the knights of the shire became more assured in their functions as representatives of all persons who contribute to their salaries, viz. of (1) the lesser Crown vassals, (2) the sub-vassals, (3) the contributing freeholders of estates not liable to scutage. By the stat. 12 Richard II. c. 12 "custom" was held to decide the question. But so long as these relations were in process of creation, the deputies of the counties took counsel with their constituents (Rep., i. 308, 309), which transactions are characteristic of this early period of taxation. In some counties, as in Kent, divergent systems of contribution were maintained (Parry, 76). Still more divergent was the system of the Cinque Ports, which, in analogy to the military vassals, had onerous duties to fulfil *in natura*, in respect of sea defence, and so were excused from contributing to the aids, and on that account did not send representatives to Parliament until later.

3. The *boroughs* had been from time immemorial subjected to a comparatively arbitrary taxation. But the redemption of the tallages by fixed sums, the interest of the Crown in preserving the prosperity of the towns, the actual necessity for an uniform system of taxation, all brought the municipal *tallagia* more and more to the level of the *auxilia* of the feudal vassals. In a clause of the first draft of Magna Charta this was even expressly laid down, but it was omitted at the first confirmation. The grants of tenths, fifteenths, and other income taxes were originally only made of "good-will." The resolute resistance, especially on the part of London, had aided in bringing about the *Confirmatio Chartarum* of 25 Edward I. The Crown, moreover, found that it attained better results through friendly negotiations. Here also there was originally a mixture of old obligation and new grant of "good-will." The Crown saw itself obliged to extend the summons to as many cities and boroughs as possible, for, when an understanding had been arrived at with the more influential towns, the smaller, which were summoned with them, yielded. After 6 Edward III. the old right to the municipal *tallagia* appears merged in the general grant of subsidies (Rep., i. 305, 306). But whilst this state of things was in a state of transition the representatives of the cities were frequently required to take counsel with their constituents, as in 13 Edward III. After the scale of taxation had been determined upon, these consultations fell into disuse.

4. The old *tenants in ancient demesne* found themselves in a state of dependence, in which an arbitrary right of the Crown to impose taxes was sure to last longest (Rep., i. 280). But for economical and legal reasons they might not be overburdened, and a parallel state of taxation had likewise to be applied to their case. Their deputies were frequently summoned to Parliament, but they were never allowed to meet with the commoners, or to form a part of the Parliament. But the more they were accustomed to be placed as a matter of course upon an equal footing in respect of taxation with the freeholders and burgesses, the more did they blend with the tax-paying *communitas*, so that as early as 15 Edward II. the estates of the realm fulfil functions as representatives of the tenants in ancient demesne (Rep., i. 283). However, for some time the habit was adhered to of demanding *before* a campaign an *auxilium* of the tenants in ancient demesne, *after* the campaign one-tenth or one-fifteenth, according

as the previous *auxilium* had produced a greater or a smaller sum (Thomas, "Exchequer," p. 35). Also after the *Confirmatio Chartarum* Edward I. held fast to the principle that the taxation of his tenants in demesne was a manorial privilege, which continued without grant of Parliament. But in the year 1332 Edward III. promises that he will not for the future raise any *tallagia* otherwise than as in the time of his predecessors, and this is apparently the last instance of a raising of the *tallagia* in the way of a special taxation of *talliable* tenants (Stubbs, ii. 521).

5. After the bull of Urban the *clergy* refused at first all taxation for civil purposes. After Edward I. had broken through this refusal so far as based on principle, a difference was still maintained between the taxation of their baronies and their other income. For the taxing of the baronies the prelates meet together with the secular lords in the Upper House as representatives of the ecclesiastical military fiefs. For the other temporalities and spiritualities (tithes), negotiations were carried on again with the bishops and the representatives of the inferior clergy in convocation, and here also an equivalent *donum* was granted. According to the scale of Pope Nicolas (1291), the income of the clergy, exclusive of the baronies which were to be taxed by the prelates, was computed at not less than £199,311. The produce of a clerical tithe should accordingly have been, in round numbers, £20,000, but it gradually sank down, owing to numerous exemptions, especially that of the small livings under ten marks value. Under Henry VII. the amount was computed only at £10,000.

6. The system of *duties and indirect taxation* at the close of the former period has been discussed above. The financial administration saw itself still entitled, by virtue of the royal rights appertaining to harbours, fairs, and markets, to raise duties by special negotiation with the merchants, and to increase the same with the consent of the parties concerned, independently of any proceedings in Parliament. A parliamentary vote of 1275 granted to Edward I. a duty of a half mark per sack of wool, and on every three hundred fleeces, and one mark per load of leather as a legal duty. But the necessities of the year 1303 again led to an arrangement with the foreign merchants for a duty of forty pence per sack, and one mark per load, at which the evasion of the *confirmatio chartarum* was excused by saying that the merchants were "foreigners." Under Edward III. (1328) the fixed duties became a portion of the ordinary revenues, and received a fresh sanction in the statute of Staples (1353). The irregularity of the impositions of duties upon the market produce of the country, the so-called staple commodities (wool, lead, tin) was, however, for a long time enhanced by the protective interests of the merchants themselves, who indemnified themselves for the higher rate of taxation through the interest they had in protection. Arbitrary confiscation of wares, such as took place in 1294 under Edward I., ended with a release on payment of three or five marks per sack of wool, for which the merchants could indemnify themselves by increasing the price. The system of privileged staple places, which was developed under the three Edwards, is based upon common financial and protective interests, the disadvantages of which for the consumers were only gradually appreciated. Under Edward III. commercial monopolies were alternately abolished and reinstated. In the year 1362 an Act of Parliament was passed, making every levy of a duty upon wool dependent upon the express sanction of Parliament. After the year 1373 the indirect taxes under the name of "tonnage and poundage" were subjected to a regular parliamentary grant.

After the recognition of the parliamentary right of assent, we still find in the *confirmatio chartarum* separate grants of taxes by the clergy, the barons, the counties, and frequently also by the tenants of royal demesnes, in proportions which, in the case of the barons and counties, are as a rule estimated lower than those of the others, out of regard to the considerable feudal imposts upon the baronies and the knights' fees. This proportional adjustment leads to the conclusion that with the assistance of the Assessment Commissions uniform taxes upon the returns of landed estates and personal income had been already arrived

at. At intervals, besides all this, the king again puts forth fresh demands for equipment of soldiers, performances in kind, and indirect taxes of all sorts, in consideration of which a reduction is often made in the proportions. During those periods in which the monarchy was weak, and the influence of the magnates and the great landed proprietors in the ascendant, the landed interests tried indirect taxes by way of experiment, and for a time even a poll-tax. The following incidents will perhaps suffice to illustrate the fluctuations. In 9 Edward II. the barons and counties vote from every *villa* in the kingdom one foot soldier, with accoutrements and pay (later changed into a tax of one-tenth); for this boroughs and demesnes yield in the next parliament one-fifteenth. In 10 Edward III. the grant was supplemented by a tax of forty shillings for every sack of wool exported by English merchants, £3 when by foreign merchants. In 13 Edward III. the earls and barons vote for themselves and for "their peers of the land, who hold by barony," the tenth sheepskin and lamb from their demesnes; the commons 2500 sacks of wool. In 14 Edward III. the prelates and the barons vote for themselves and their vassals, the ninth sheepskin and lamb for two years; the knights of the shire for themselves and the *communes de la terre* the same; the boroughs the actual ninth part of their personal property; those merchants who did not reside in boroughs, and the other inhabitants of forests and wastes one-fifteenth. In 20 Edward III. an *auxilium* of forty shillings was raised for knighting the Prince of Wales, although the Commons, according to the statute of Westminster only concede twenty shillings, and refuse their consent. In 45 Edward III. both Houses vote a subsidy of £50,000, and in like manner the clergy an aid of £50,000. In the case of the first it was presupposed that each parish paid 22*s.* 3*d.*; but the number of the parishes had been so grossly miscalculated that shortly afterwards a small committee was summoned, which granted one hundred and six shillings for each parish, to produce the sum of £50,000. In 46 Edward III. the indefiniteness of the systems was once more shown in the fact that the knights of the shire were dismissed, but the representatives of the boroughs were retained and prevailed upon to vote certain dues upon wine and goods for another year (Parry, 133). Even at the close of this reign all reservations had not yet been given up. In 51 Edward III. it is declared that it is not the King's will to impose any burden upon the people, without the consent of the Commons, except in cases of great necessity and for the protection of the realm, and where he can do so of right ("Parl. Hist.," i. 328).

After 8 Edward III. a definite scale of taxation for counties and towns had at least been agreed upon, which simplified the business of voting supplies. According to the estimates of this year the tenths and fifteenths for the laity were assessed in round sums, the separate distribution of which among the individual tax-payers was effected by the committees of assessment. The tendency constantly pursued from that time to pay fixed sums in satisfaction of the claim, leads to a continual reduction in the tax returns. So early as in the fifteenth century the sum produced by a tenth and fifteenth on the laity was only about £37,000; in the year 1497 the returns had sunk to £30,000, and that of the clerical tithe to £10,000 (Stubbs, ii. 550). The Commons shortly afterwards introduce the custom of requesting a deputation of the lords and prelates to deliberate with them. For instance, in 47 Edward III., on their motion, a number of bishops and lords had been appointed. In the full sittings that ensued, they deliver their written consent, beginning with the words, "The Lords and Commons of England have in their present Parliament granted the King a fifteenth," etc. (Rep., App., iv. 659-662). This conference with deputies from the Upper House now became for a time the ordinary form of proceeding. As a rule the Commons themselves appoint those persons who are agreeable to them. In 6 Richard II. they choose three prelates, three earls, and three barons; their petition was granted with the proviso that it was a matter for the King's selection to appoint such bishops and lords as he shall find fitting, or others whom he shall him-

self nominate (similarly in 4 Henry IV.). In 7 Richard II. the Commons, "with the consent of the Lords," vote two-fifteenths; then again in the same year Lords and Commons together a half-tenth and a fifteenth. In 21 Richard II. the Lords and Commons made the King a considerable grant, even for his life (which happens once again in 3 Henry V.). In 13 Henry IV. the Commons, with consent of the Bishops and Lords, vote a subsidy wherein the contributions from real estate were plainly described as being a land-tax ("Parl. Hist.," ii. 119). Grant of the Commons with the assent of the Bishops and Lords became from this time forth the most usual formula, particularly in 3, 4, 5 Henry V.; 18 Henry VI.; 28 Edward IV. Apart from the phraseology, which still varies, the instability of the system of taxation, and the inexperience of the taxpayers, is shown in numerous experiments in taxation. The curious grant of a uniform sum from each parish in 45 Edward III., on which occasion Parliament had assumed five times as many parishes as in reality existed, has been already mentioned. In 51 Edward III. the Lords and Commons grant a poll-tax of fourpence upon all male and female persons above fourteen years of age, except beggars, with the excuse that they could not at this time grant more. This mistake of the upper classes was repeated early during the minority of Richard II., and led to the violent uprising of the labouring classes, after which the unfortunate poll-tax does not again occur. In 5 Richard II. a subsidy on the wool was again granted.

Under the house of Lancaster the contributions from real estate and from personalty still more regularly diminished. Under Henry VI., however, the influence of the regency, and later of the absolute impotence of the monarchy was again visible in new experiments in new taxation. In the Parliament of 1427–1428 a new and more complicated method of taxation appears; all parishes whose churches were rated at more than ten marks were to pay 13*s.* 4*d.*; smaller parishes 6*s.* 8*d.*, the smallest parishes 2*s.*, payable by the members of the community; from each knight's fee 6*s.* 8*d.* In the year 1435 a progressive income-tax was introduced: incomes of a hundred shillings pay 2*s.* 6*d.*, and 6*d.* additional for every pound up to £100; those of more than £100 pay 8*d.* in every pound; above £400, 2*s.* in the pound. Analogous grants were made by the clergy in convocation. In the year 1439 the grant is made of one-fifteenth and three-twentieths, supplemented by a tax upon foreigners, 16*d.* upon householders, and 6*d.* poll-tax upon individuals. Under the house of Lancaster the ordinary revenue of the King had much diminished, in consequence of the stricter conformity of the administration with the law, and the numerous limitations of the Crown in its financial and other profitable rights and arbitrary powers; and the Duchy of Lancaster, which had been made a royal entailed estate, brought only a small surplus, in consequence of numerous permanent burdens laid upon it; whilst the wars in France and in later times the defence of the remnants of the English possessions in France, caused the Crown considerable expense. According to Lord Cromwell's statement of 1433 the ordinary revenue still available had, owing to fixed burdens, become reduced from £23,000 to to £8990. The Duchy of Lancaster brought in only £2108 nett; the indirect taxes upon wine and other commodities brought in £26,966. The expenses of the garrison of Calais, on the other hand, alone exceed the ordinary revenue of the Crown (Stubbs, iii. 117). To this period belong also precedents of an authorization to contract loans. With the assistance of his council the King was empowered to borrow money by warrants under his privy seal. Frequently, too, the members of the council advanced money from their own resources, or gave personal security to the merchants who lent it. At difficult junctures they were empowered by Parliament to give security for great loans, by pledging the taxes which were due. After 1421 the sum for which the council should be authorized to give security was generally limited, the amount being from £20,000 to £100,000. After the death of Cardinal Beaufort these transactions disappear.

During the wars of the Roses finan-

cial embarrassments, as may be well understood, had become permanent. Under Edward IV. new extraordinary imposts were accordingly introduced. The Parliament of 1472 granted an army of 13,000 archers, to be paid at the rate of sixpence a-day for a year. The Commons and Lords, in two separate documents, further resolved that a new and full tenth should be levied upon all property and income to defray the expenses. In the following year, however, this was found too difficult to collect, and so a fifteenth was voted after the old fashion. In the same year begin exactions by way of benevolences (forced gifts from private individuals), which soon became odious. In the following year (1474) the grant appears in a round sum.

It was not until the royal power had become completely restored under the dynasty of the Tudors that the system of direct taxes, as land-tax and income-tax, was completed, put into regular execution, and permanently established. Under Henry VIII. the grant in 1514 rises to £160,000, according to a carefully graduated scale from land, personal property and income. Under Mary the expressions subsidies, incomes, tenths, and fifteenths acquire definite technical meaning, the subsidy as a land-tax of twenty per cent. (4*s.* in the £), the tenths and fifteenths as an income-tax of thirteen one-third per cent. (2*s.* 8*d.* in the £) (Stubbs, iii, 355).

CHAPTER XXVI.

The Church at the Close of the Middle Ages.

The thorough remodelling of the State in this period is confined to temporal interests, and to the legal relations subsisting between the laity and the royal power. The Church remains unchanged in the face of this metamorphosis, and includes all classes in a constitution of which the form differs greatly from the spirit. At the close of the preceding period the power of the Roman Catholic Church had reached its zenith, at which point it had become a compact political system.

A sovereign Head of the Church confronts the temporal King, and in England claims even a feudal suzerainty with a feudal tribute to be paid annually.

A spiritual parliament, with an upper and a lower house (convocation), confronts the secular parliament.

An exclusive ecclesiastical legislation, grant of taxation, and jurisdiction stand firmly opposed to that of the temporal power. This jurisdiction, in the ecclesiastical sense, embraces a system analogous to that of our modern administration, executed by professional officials with a bureaucratic constitution. Moreover, the most important temporal offices of Lord Chancellor, Master of the Rolls, Keeper of the Privy Seal, and not unfrequently that of the Lord Treasurer, were still in the hands of clerics.

Both political systems now rank side by side, each to a great extent requiring the help of the other, each supplying the other's deficiencies, both embracing all classes of the

population. The great wealth of the Church (1) at first attracted all classes of the community to her service. The number of the *clerici* was accordingly extremely large; the lists of ordinations in the greater dioceses often show hundreds of persons who in the course of a single year had received the higher consecration. Almost every family had relations among the lower clergy, the country squire counted kinsmen among the canons of the greater foundations, whilst the higher nobles and officers of State strove to gain episcopal sees for their sons who were dedicated to the clerical profession; even the bondsman class found a place open to it, in spite of legal prohibition. Among the lower classes, the influence of the Church became even more extensive, now that the orders of mendicant friars had entered into bonds of sympathy with the poor, who, in very many matters, found reason for being discontented with the laws and measures of taxation established by the wealthy. The bureaucracy of the Church, with its standing army of monks and spiritual orders, had developed itself into a steadily working system of dominion over the human mind. No temporal rule could, for any length of time, maintain itself in hostility to such a power as this, which swayed the masses, and continually admonished them to obey the divinely appointed ruler. As the Church, on the one hand, extended her consecration to the monarchy, so, on the other hand, she guaranteed the rights of the estates, and from a like interest as the nobility, held fast to Magna

(1) "The clergy were, as a body, very rich; the proportion of direct taxation borne by them amounted to nearly a third of the whole direct taxation of the nation; they possessed in the constitution of Parliament and convocation a great amount of political power, a majority in the House of Lords, a recognized organization as an estate of Parliament, two taxing legislating assemblies in the provincial convocations; they had on their great estates jurisdictions and franchises equal to those of the great nobles, and in the spiritual courts a whole system of judicature parallel to the temporal judicature — but more inquisitorial, more deeply penetrating and taking cognizance of every act and every relation of men's lives. They had great immunities also, and a corporate cohesion which gave strength and dignity to the meanest member of the class (Stubbs, iii. 365, 366). The estates of the bishops and monasteries extended into almost all the sub-districts of the country. They were well managed; the Cistercians especially were regarded as good farmers and sheep breeders. The Church appeared everywhere to the country people as a generous landlord. (See Stubbs, iii. chap. xix., touching the whole relations between Church and State.)

Charta, the confirmation of which instrument was repeatedly brought about by the higher ecclesiastics. Their judgment it is which makes constitutional oaths binding, and theirs also which in turn releases from them. (2)

This mutual relation also finds expression in the parliamentary constitution. In it the estate of the prelates did not, as on the Continent, appear as a mere representation of manorial rights, but as summoned by royal writ to the highest deliberative, judicial and tax-imposing assembly. But the royal right of summons had a different significance for the ecclesiastics and for the barons. The summons of the bishops resulted naturally from their constitutional position as pillars of the ecclesiastical power, and elevation to the bench of prelates was after King John's reign no mere grant of favour. The clerical caste for a long time nominated its rulers by free canonical election, and made the grant of the temporalities a mere confirmation on the part of the King. The caste spirit created by the celibacy of the clergy kept the prelates more closely united than the secular magnates. The privilege of clergy made them personally much more independent than the temporal lords. It was accordingly an advantage of this administration of the realm, that the benches of the bishops and the temporal lords could not, at all events, form two independent chambers, as was the case on the Continent, where the landed interests had become the basis of the estates of the realm. The claims advanced by the bishops were moderated by the voices of the barons, and the martial insolence of the great temporal lords kept in check by the votes of the spiritual magnates, who, according to the parliamentary writs, even formed the majority, though they did not always appear in such num-

(2) The state of things in this period was certainly somewhat different to that in the preceding. In former times the clergy simply preached obedience towards the King, but the clergy was now always ready to quote instances of "Kings like Saul and Herod" in the disputes between Church and State on matters of jurisdiction; and it was no easy task to determine "what was to be rendered to God and what to Cæsar," according to the preachers' ideas. There had unmistakably come about a cooler relation to the monarchy on this side (Stubbs, iii. 513).

bers. Most beneficial of all for both parties was the customary co-operation of the prelates and barons in the great council, in conducting the responsible business of the central government.

In accordance with his experiments at a political government on a great scale, the aim of Edward I. is directed towards summoning the chapters and the parsons of parishes to Parliament in addition to the prelates, in order to have the ecclesiastical middle class duly represented, and to bring about an understanding with the *gentz de la commune*. The immediate occasion for this was certainly given by the system of taxation; but the consistent enforcement of this measure and the systematic opposition of the clergy to it, proves that the royal council recognized in it a politically important measure. At first, to combat the papal prohibition of taxes, Edward I. was desirous of giving the inferior clergy a position analogous to that of the Commons, with a view to arousing and keeping alive in them a feeling for the common weal. Consequently an instruction, bearing the introductory words *Præmunientes*, (3) was addressed to all the bishops, enjoining

(3) Since 23 Edward I. the writ issued to the Archbishop of Canterbury runs as follows: "*Sicut Lex justissima, provida circumspectione sacrorum principum stabilita, hortatur et statuit, ut quod omnes tangit, ab omnibus approbetur, sic et innuit evidenter, ut communibus periculis pro* (per?) *remedia provisa communiter obvietur. . . . Præmunientes Priorem et Capitulum Ecclesiæ vestræ, Archidiaconum, totumque Clerum vestr. Diocs. facientes, quod iidem Prior et Archidiaconus in propriis personis suis, et dictum Capitulum per unum, idemque Clerus per Procuratores duos idoneos, plenam et sufficientem potestatem ab ipsis Capitulo et clero habentes, una vobiscum intersint, modis omnibus, tunc ibidem ad tractandum, ordinandum et faciendum, nobiscum et cum caeteris Prelatis et Proceribus, et aliis Incolis regni nostri, qualiter sit hujusmodi periculis et excogitatis malitiis obviandum.*"

The pattern for this formula is met with as early as 22 Edward I. in the writs of summons to a convocation ("Parl. Writs," i. 19). The clergy in this assembly assesses itself on account of its tenures in frankalmoign, on account of its glebe lands, and its personal property. The prelates also in the spiritual assembly vote the amount of the tax only upon their spiritualities, whilst their feudal estates grant the common aids together with the barons in Parliament (Rep., i. 214). The clause *Præmunientes* was retained in the same sense after 23 Edward I. without material alteration, yet not always added. But from the first the clergy showed a strong resistance to the royal summons, and therefore in the years 1314–1340 a separate circular was addressed to both archbishops, urging them on their part to provide for the appearance of the clerical profession in the parliaments. After 1340 the Crown was content with the practice, that the clerical tithes should be voted in the provincial synods, and henceforward laid less weight upon the appearance of the lower clergy in Parliament

them to summon to the national assembly the deans and archdeacons in person, to represent each chapter by one, and the clergy of each diocese by two deputies, who were to increase the Parliament by about one hundred ecclesiastical members, and deliberate in the same manner as knights and citizens. But there immediately arose a violent opposition against this method of voting the taxes jointly with the laity, and against this kind of summons. In 7 Edward II. the clergy declares it not to be usual that they should be summoned under the authority of the King, and that they ought not legally to be so summoned. For the next Parliament a second missive was for the first time addressed to the Archbishop of Canterbury, with a repetition of the order to appear. Still the clergy in 8 Edward II. protest even against this indirect citation. They describe the Parliament as a *curia singularis*—begun and continued in the King's *camera*,—and to such a *curia* the clergy could not be summoned without a manifest infringement of their privileges. They make at this time their grant of subsidies dependent upon a previous papal mandate of authorization, such as in 13 Edward II. had allowed the grant of a tenth for a year ("Parl. Hist.," i. 159, 177). In 15 Edward II., in two convocations, they vote once again an aid "in obedience to the authority of the apostolic chair." In 16 Edward II. every further money grant without this authority was plainly refused (Peers' Report, i. 284). In 17 Edward II., the King finds himself obliged to entreat the two archbishops to convene a convocation. In the course of the dispute, however, this opposition was overcome with the assistance of Parliament, after the Crown had agreed, in

(Stubbs, iii. 320). With regard to the papal prohibition of the taxation of a clerical income a fiction was resorted to; namely, that the clerical grants were made of "free will," and since the clergy besides shared the higher rate with the cities (generally one-tenth where the counties pay one-fifteenth), this taxation gave less reason for irritation. The convocations as a rule determined likewise to pay the rate voted by the cities, without further dispute. About the same time the oppression of the papal taxation ceased, which had been severely felt in the century of the three Edwards. After the popes had taken up their residence at Avignon, this pressure became lighter, and Richard II. was enabled to directly forbid the exaction of a papal impost (1389). The feudal tribute promised by John had been already abolished by resolution of Parliament in the year 1366.

addition to the writ of summons addressed to the bishops, to issue another and special summons to the archbishop. Only the latter, as being an ecclesiastical authority, was obeyed, and as being a summons to a "convocation" and not to Parliament—whereby an appointment of time and place was very often made differing from those contained in the royal writ. The representatives of the lower clergy only appear as members of their spiritual synod, and not as members of Parliament. With this rule the writ of summons (Præmunientes) became after Edward III. the regular formula. (4)

In these proceedings lay a grand attempt to effect the union of all ranks, but also a proof of the truth that no assembly of estates can have any foundation without legal equality. In the Upper House that equality existed for prelates and barons by feudal tenure and royal summons, and above all by their customary co-operation in the central government,—they accordingly cleave together; the inferior clergy, knights, and citizens, however, do not. The more firmly knights and citizens as commoners are welded together in the Lower House, the more do the aspiring middle classes appear to become estranged from the clergy. A blending of the temporal middle

(4) The words employed in 11 Edward III. and in later times repeated in the second missive addressed to the archbishops: "*justum et consonum rationi, ut per communia subsidia communibus periculis occurratur*," found in Parliament as well as in the country an echo, which the clergy was not able permanently to ignore. In 18 Edward III. for the first time the grants of convocation were entered upon the parliamentary rolls, and finally fixed in the form of a statute (Rep., i. 317). The existence of separate money-voting assemblies led, however, for some time longer to conflicts. For instance, in 4 Richard II., the Commons propose 100,000 marks, if the clergy (who possessed one-third of the kingdom) would grant 50,000 marks. The clergy answered that their grant had never been made in Parliament, nor should it be so; the laity should not and could not bind the clergy, nor the clergy the laity; the Commons might do their own business, and they would do the same. In 9 Richard II. the granting of a vote of subsidies under the condition that the clergy should vote a certain sum, led to similar protests ("Parl. Hist.," i. 384). But as Parliament would not give up its privilege of confirming the taxes which had been voted by the convocation, so the Parliament also claimed that its statutes should bind the clergy, "like the statutes of all Christian princes in the early centuries of the Church." The question never came to a constitutional settlement, for the conflict was appeased in the fifteenth century by the money grants of the clergy being made in a separate assembly. But on that very account the King was obliged to derive the duty of the bishops and abbots to appear in the Upper House from their feudal duties, and had therefore, for consistency's sake, to dispense with the attendance of abbots who held no fees of the Crown.

classes with the inferior clergy could scarcely be effected in the face of the utter difference in their way of life, their education, and social interests; least of all was this possible with the celibate clergy of the Roman Catholic Church. The Commons in Parliament reply to the energetic efforts of the clergy towards separation with an equally keen jealousy of ecclesiastical rule, so far as it appeared as the government of a foreign ruler; and this jealousy had become still more enhanced since the migration of the Popes to Avignon.

In this crisis the monarchy gains an ascendency, at first in all points, where the privileges of the Church come into conflict with the common law. The King had now a Parliament to help him, which began to watch with jealousy over national honour and independence. The Church was allowed full sway in those departments which did not immediately affect the common law, such as marriage law, wills, ecclesiastical offences, and in the Chancery courts, and those of the Universities and the Admiralty. But every attempt to change the common law (such as by introducing legitimation, contracts of married women, etc.) was firmly rejected. "*Nolumus leges Angliæ mutari*," the barons had already replied at the Parliament of Merton (20 Henry III.). When in 1296 the clergy began on principle to refuse their contributions to the national taxes, Edward could venture to declare the Church beyond the pale of his feudal and judicial protection. On a similar occasion the Parliament declared, in 1301, that the Pope had not the right to interfere with the temporal affairs of the Crown, and that they would not permit the King, even if he were so inclined, to concede any one of the papal claims. But most zealously did the peers and commons side, as was natural, with the monarchy in the dispute touching the taxation. When Urban V. went so far as to renew the claim to feudal suzerainty and feudal rents, Edward III. unreservedly withdrew from the old relation of papal protection, and asserted, in conjunction with the estates, the independence at once of the country and of the national Church. Under the same reign, repeated motions of the

Lower House against the clergy followed, and a petition that no ordinance be issued on the motion of the clergy, and that the former should not be bound by regulations which the latter made for their own advantage. In 1371 the proposal was even made to remove all clergy from the high offices of State, and to fill these offices with laymen, which, in the case of the Chancellor and in the Treasury, was for a short time actually done. The Parliament of 1399 declared "the kingdom of England, as in all bygone times, free of all papal or other foreign interference." Under Richard a dislike to the clergy was shown, in the protection accorded to the heretics (Lollards) which in 1406 led to the proposal to withdraw all such as were suspected of heresy from the episcopal jurisdiction. It was not until Henry IV. that the Church obtained from the State more rigorous penal laws against the heretics, in spite of the continued opposition of the Lower House. Under Henry V. heresy was declared an offence against the common law also; the secular arm did not merely lend assistance to the spiritual court, but the temporal courts were to exercise concurrent penal jurisdiction side by side with the spiritual. The house of Lancaster was too immediately dependent upon the support of the clergy, not to give way entirely in this point.

The visible result of these conflicts was a legal definition of the rights of the executive against the encroachments of the Church in the external provinces of law and taxation. As the ecclesiastical constitution stood pointedly opposed to the secular power, there was no other course open but to employ the temporal penal legislation against a series of definitely named excesses, which gradually form a connected system. The State, now governed by parliamentary statutes, did not relapse into the system of administrative compulsion by means of amerciaments, but achieved a firm and uniform observance of the limits of ecclesiastical power by decisions of the ordinary courts of justice in the form of parliamentary penal statutes, which were indeed rigorously framed according to the spirit of the Middle Ages, but were considerably mitigated in practice.

1. Under the general term *præmunire* a number of violations of the province of the secular state by the ecclesiastical power were threatened with severe penalties. The first statute, 27 Edward III. stat. 1, is directed against the citations to Rome in matters which belong to the cognizance of the royal court. The writs of "*præmunire facias*" which were issued with reference to this, and threaten banishment and severe corporal and pecuniary punishments pave the way for a series of statutes, which repeat the penalties of *præmunire* against the obtaining of ecclesiastical offices to the prejudice of the King or any one of his subjects, against the exportation of money to foreign parts, against the introduction of sentences of excommunication from foreign parts, against the exemption of clerical personages, against immunity from the liability to pay tithe, and finally against the interference of the Pope with ecclesiastical elections. The *præmunire* did not, however, prevent an action being brought in the papal court in cases where, according to common law, no action lay. On this question as on others a kind of compromise was effected between the Crown and the *Curia*. A royal veto was seldom exercised, but the appeals to Rome now seldom appear.

2. The *Statute of Provisors*, 25 Edward III. stat. 4, threatens all persons who accept the grant of a benefice from the Pope with imprisonment and forfeiture by the nominee of all income arising from the office. The practical result was, however, here also a compromise between the Crown and the *Curia* at the expense of election by the chapter. In the case of a vacancy the King sent the chapter "his licence to proceed to the election," simultaneously with a letter, which pointed out the person whom the King, in case of their election, would accept. At the same time, the Pope was requested by letter to confirm the same person by papal provision. All repetitions of the statutes only led in practice to a division of the appointments between the King and the Pope. (5)

(5) The free canonical election conceded by John met with an impediment in the faulty constitution of the English cathedral chapter, and became at first enveloped in a long series of controversies. In the years 1215-1264 not less than thirty contested elections of prelates were car-

3. These are closely followed by supplementary statutes of a more special nature. For instance, in this year 1349, on a special occasion, an ordinance was issued with the consent of the barons and Commons, which prohibited the introduction, acceptance, and enforcement of papal bulls and other missives in the kingdom, and threatened all who contravened the order with arrest. This ordinance was not registered as a statute and remained unenforced, but was in later times in a revised form incorporated with the statute of *præmunire* (25 Edw. stat. 4). To the same series belong prohibitions of alienations in mortmain (7 Edw. I. stat. 2), partly of the era of Edward I., and later parliamentary enactments; *articuli cleri* (9 Edw. II. stat. 1) containing sixteen articles of grievances set forth by the clergy touching secular interference, with the answers of the King in council having reference thereto; the statute 14 Edward III. stat. 4, touching the due administration of clerical estates pending vacancies in the sees; the statute *de asportatis religiosorum* (35 Edw. stat. 1) against the payment of taxes and money from English monasteries to foreign superiors; all which are the outward expression of the repelling of ecclesiastical encroachments and of

ried to Rome for final settlement. It was not until Gregory IX. had, in cases of this sort, rejected both candidates, and declaring the right of election forfeited had appointed a third, that the appeal to Rome became less frequent. But after Edward I. both King and Pope exercised their influence with such resolution, that for more than a century the right of election became almost ineffectual. From the commencement of the fifteenth century the papal claim assumed the form of a direct appointment (provision). Gregory IX. already had demanded of the bishops of Lincoln and Salisbury a "provision" of not less than three hundred foreign clergy; in later times Innocent IV., after the knighthood had began to help themselves by driving away the foreign *clerici*, had abandoned these direct claims in England. In the fourteenth century, however, the papal provisions and reservations again played an important part, though the Pope and the King usually came to an understanding, and a free election by the chapter was seldom effectual. It was Henry V. who first restored to the chapters their "free" election, whereupon Pope Martin V., in the course of two years, filled no less than thirteen episcopal sees by "provision." Under Henry VI. a kind of compromised division was resorted to, by virtue of which the King as a rule succeeded in appointing his nominees, and the Pope his Italian candidates. Under Henry VII. the King's nominees were without exception appointed. We must remember that in all these instances, the question lay in the background—"whether the King and nation should accept, at the Pope's dictation, the nomination of so large a portion of the House of Lords as the bishops really formed," which "would have placed the decision of national policy in foreign hands" (Stubbs, iii. 318).

the beginning of a movement which in the sixteenth century culminated in the Reformation. (6)

The internal reasons for the gradually increasing feud between Church and State lay, however, in the altered vocation of the Church itself. The roots of its power were also the roots of its decay. Both are contained in the moral and intellectual life of the people. When the battle of the nationalities was forgotten, the oppression of the weaker

(6) The parliamentary statutes against the encroachments of the ecclesiastical power in this period chiefly concern property and taxation; yet in certain points involve also the ecclesiastical jurisdiction and the province of coercive measures against the laity. They are important from the points of principle, in so far as the King in Parliament definitely claims to exercise the higher right of decision, where the limits between the spiritual and the temporal power are matters of controversy. From this point of view the statutes concerning *præmunire* are the most important. A clear survey of the statutes affecting the clergy is given by Rowland ("Manual of the English Constitution," 1859, pp. 137–156). Stubbs rightly remarks: "Almost all the examples, however, in which the clergy went beyond their recognized rights in regulating the conduct of the laity, come under the head of judicial rather than of legislative action; in that department the common law had its own safeguards. . . . Petitions in Parliament against the encroachments of the spiritual courts are frequent, any direct conflict between the two legislatures is extremely rare. . . . If the class-sympathies (of the bishops) were with the clergy, their great temporal estates and offices gave them many points of interest in common with the laity. . . . England was spared during the greatest part of the Middle Ages any war of theories on the relations of the Church to the State" (Stubbs, iii. 326).

In Parliament itself the prelates never forgot their ecclesiastical interest, yet voted as a rule on questions of public and social policy in a patriotic and moderate spirit.

For the regulation of the jurisdiction of the tribunals the Crown had, moreover, the assistance of the early technical framing of the writs with regard to the rights of the Crown. All suits touching the temporalities of the clergy were subjected to the jurisdiction of the royal courts, and scarcely a trace of opposition to this arrangement can be discovered. Even Glanvill gives certain formulæ of the "prohibition," by which spiritual tribunals were forbidden to entertain suits in which a lay-fee was involved. Particularly a *writ of prohibition* issues against the excommunication of a royal vassal or servant without the sanction of the King. As against the prelates the customary law of seizure of fiefs was also enforceable. For instance, in 1381, Edward I. in the sternest terms forbade the archbishops and bishops to discuss questions in their *Concilia* which concerned the Crown, the person, or the council of the King, or to make any constitution against his Crown and dignity, "if their baronies were dear to them." To the controversial measures for conquering the resistance of the clergy to the taxation belongs a curious military command (Rot. claus. 43 Edw. III., iii. 13, 1369) by which the bishops are ordered to arm all abbots, priors, monks, and other spiritual persons, from the age of sixteen to sixty, to draft them into contingents, and drill them, and are referred to the decree of Parliament touching the national armament against France. This extraordinary document has been copied in Grose ("Military Antiquities," vol. i. pp. 44–46). Three similar writs of the dates of 46 Edward III., 47 Edward III., and 1 Richard II. are to be found in Rymer.

classes mitigated, villeinage dying out, and the State beginning to display more anxiety to give due legal protection, the Church had been deprived of a portion of its great tasks, which were now more justly cared for in secular legislation and administration. This was true also of the Church as an educational institution. Whilst she had been until the thirteenth century the *alma mater* of all peaceful arts and sciences, from that time a falling off is observable in her intellectual cultivation. The fact was particularly important that in the thirteenth century the jurisprudence of the laymen had emancipated itself from the Church, and begins to make itself the champion of universal struggles for emancipation, which are soon followed by the thronging of the laity to the universities. A political life that was peaceful and orderly, when compared with that of the Continent, had rendered aspiring spirits more susceptible to the arts of peace. The educational institution of the Church had for a time uniformly remodelled the nations, but thus cultivated and elevated they slowly return to their own paths again. To these justifiable national and intellectual aims and aspirations the Church had nothing else to oppose than political power and spiritual coercion. The firmer the canonically elected dignitaries held their baronies, the more did they begin to feel at ease as landed nobles, especially as, on the other hand, the nobles entered the Church in great numbers.

In England, also, it was birth that now decided the appointments to the high offices, whilst merit, education, and capacity were overlooked. The revenue became more and more concentrated in the hands of the prelates, the tithes were largely appropriated by monasteries and foundations, to the prejudice of the preaching and working clergy. The Church, thus constituted, possessed neither the energy nor the will to vie with the rise of learning amongst the laity, but abandoned a part of her province to the lay jurists, whilst she only opposed the higher and more general aims by repulse, spiritual coercion, and the prohibition of independent investigation. The natural consequence was that doubts arose as to the authority

of the Church, both in its spiritual, and in its temporal capacity, coinciding with the fearful state of confusion of the Roman *Curia* and the high ecclesiastics on the Continent. But as the heresies attack the very dogmas and the constitution of the Church, and the latter now begins to fight for her existence, she makes use of her immense power, and punishes heresy as ecclesiastical high treason and as a political crime. In England this was, of course, more difficult, as the execution of the penal sentence was dependent upon a royal writ. With difficulty the Church obtained a writ from Richard II., which empowered the sheriffs to arrest heretical preachers, but which reserved in the case of laymen a special chancery writ for every arrest. Even against this the Lower House protested with the declaration "that they were not minded to bind themselves or their heirs to the prelates more than their ancestors had done." It was not until Henry IV. that the Church obtained free scope for her penal jurisdiction without a writ *de heretico comburendo*. A period of the burning of heretics now begins, and of the obligation of the officials on oath to exterminate these "conspirators against the King and the estates of the realm." But the religious confusion was for a long time covered by the still greater confusion of the struggles of the nobles in the wars of the Roses. The deeply demoralized condition of those times was partly due to the Church, which, preferring power and the goods of this world before all else, estranged itself from its vocation and the hearts of the people.

It is certainly not easy to determine with certainty how deep the anti-Roman movement had penetrated in this period. The national pride saw itself essentially injured by the papal pretensions at a time when the seventy years' "Babylonian captivity" of the papacy in Avignon had succeeded in making the papal throne the instrument of the hostile policy of the kings of France. As late as 1378, on the death of Gregory XI., in consequence of this condition of things, three-fourths of the cardinals were French. Certain far-seeing and conscientious men of the period, discerned the

still more radical demoralization of the whole Church; but their voices assuredly found more echo in the national pride than in the conviction of the untruth of individual Roman Catholic doctrines. The later events of the Reformation, at all events, give no evidence of any deep stirring of the minds of the masses. (7)

(7) During the last century of this period, a small but energetic party of the Commons was evidently untiring in its motions in favour of the new heretical tendency and against the existing institutions of the Roman Church, yet without being able to record any important success. Without exception, these attacks are directed against the position of the prelates, towards the seizure or even the secularization of their temporalities, and often also against the spiritual orders, but not against the parsons in their regular vocation of instruction and the cure of souls. That the clergy as a profession and in their general functions were not the object of the attacks, and that they still felt themselves as such safe from the laity, is shown by the characteristic phenomenon that the clergy of this period were divided against themselves into just as numerous and violent parties as the nobles and commoners. The secular hated the regular clergy, the cathedral clergy the monks, the Dominicans and Franciscans regarded each other as heretics, the Cistercians and monks of Cluny eyed each other with the old jealousy, and to all this must be added the numerous controversies arising from disputed papal elections (Stubbs, iii. 369). In any case, the moral respect in which the clergy were held was most seriously damaged by the burnings of heretics and by the behaviour of the churchmen in the wars of the Roses.

CHAPTER XXVII.

The Struggles of the King in Parliament.

The exercise of the sovereign rights had now become so closely interwoven with the self-government of the counties, and so artistically combined in Parliament, that, thanks to the wisdom of the legislator, an ideal political constitution appears to have become realized, such as harmoniously blends together all classes of society in the service of the State and expands to the utmost all the resources of the nation, enabling it to fulfil the highest tasks of its legal, educational, and economic development. But it is not given to nations more than to individuals to attain such high aims without hard trials and struggles. As in the preceding period the monarchy appears from generation to generation in an ascendant and descendant motion, so does this epoch display, in the course of six generations, an unexampled picture of a rise and fall which appears peculiar to English history, now that the monarchy had become the head of a powerful assembly of estates of the realm, in which the conflicting interests of society take the form of violent parties. There is a tragic contrast between the beautiful and glorious dawn of this period and the bloody sunset which ends it. Though to the people of that time they were questions of life and death, to us the struggles of this period appear colourless antecedents to the establishment of a system of constitutional law, just as in reality the wildest struggles ended in a firm result and permanent arrangement of classes (Chap. XXVIII.) and a firmly established monarchy (Chap. XXIX.).

Edward I. (1272–1307).

The age of Edward I. is the reverse of the immediately preceding one of Henry III. It is the age of the brilliant restoration of confidence in the monarchy; the zenith of the English Middle Ages, the period of the foundation of the systems of legislation and taxation, of judicial procedure and police laws; of a central administration with an active official staff of the counties and municipal unions, of the demarcation of the respective spheres of activity of the council of the realm and the assembly of magnates, of the process of crystallization, which now incorporated an organized representation of the *communitates* into Parliament, as being the "supreme council of the Crown," and finally of the development of the rights of Parliament in their three main channels.

The legislation still continually initiates in the King. The high ideas of this reformer, who found in Bishop Burnet a rare adviser, made him seek of his own accord the advice and the consent of his prelates and barons, and in important matters of the Commons also. These summonses (sometimes of mere assemblies of magnates, sometimes of knights of shires, and sometimes of counties and cities together) are issued on the King's unfettered judgment.

Taxation by Parliament was for the vassals of the Crown an already existing legal institution. The refusal of the clergy on principle to pay taxes, and the resistance of the magnates, induced Edward I. to make full concessions, feeling the impossibility of maintaining a one-sided right of taxation in the old manner against the united opposition of the clergy and people. A magnanimous feeling for the present and future greatness of the nation outweighed all dynastic considerations, and recognized the money grants of the *communitas regni* for the common profit of the realm, "*ut quod omnes tangit ab omnibus approbetur.*"

The control of the central administration by Parliament appears under this, as under normal reigns of later times, in the form of petitions, motions, and complaints. According

to intention and results, the military powers of the King were exercised for the honour and advantage of the realm, the judicial and police powers for the maintenance of law and peace in the country, the financial powers for the common profit of the realm, and the power over the Church for the maintenance of national independence; and on that account the estates never thought of an immediate interference with the course of government.

In the first half of the reign occurred great acts of legislation and the victorious war in Wales; in the second half the acknowledgment of the constitutional right of the estates to vote taxes and the war with France and Scotland. Financial difficulties are common to both; yet the period is pervaded by an harmonious tone. A popular monarch finds energetic and ready support as often as he demands it. This monarchical government according to laws, strengthened by the free co-operation of the estates, with its enormous development of military and financial resources, forms a marvellous contrast to the miserable personal rule of Henry III. It left behind it among the people the consciousness that the political government is best centred in a single hand—the hand, namely, of a constitutional monarch, and that it still keeps its regular course where the feeling of his royal vocation lives in the monarch. At the same time this period had fostered that spirit of manly courage which was enabled to help itself in those times in which the monarchy lacked these qualities. It was certainly no easy task under such a monarch to raise the firm and dignified opposition with which the great constable and the great marshal, the Bohuns and the Bigods of this period, at the head of the Crown vassals, raised their voices in contradiction of the King, to enforce the common right of the estates to grant taxes. The episode of Magna Charta so far repeated itself once more, and the next generation showed the necessity for this manly feeling. (1)

(1) As to Edward I.'s Parliaments, consult Parry ("Parliaments," pp. 49–69), Peers' Report (i. pp. 171–254), Stubbs (ii. secs. 179–182). The most important legislative acts have been given in the notes to Chapter XXV. The position of royal legislator is maintained in the style of the sta-

Edward II. (1307–1337).

Immediately after the death of Edward I. a foolish retreat and the cowardly surrender of Scotland indicated that the royal management of the external affairs of the State had again ceased. By the grant of the highest honours in the realm and the squandering of the moneys of the State as well as those of the royal household upon a foreign favourite, Edward II. proclaimed an equal incapacity for internal government. The insulted magnates, with the Parliament on their side, become rebellious, and league together under arms, and under the name of "Ordainers" force upon the king an executive council consisting of two bishops, an earl, a baron, and a representative of the earl of Lancaster. Although the most powerful Earl of the realm stands at the head of the opposition, yet dissension is again the outcome, followed, after a few years of mutual persecution, by the fall of the party government. If, however, these events, in which right and wrong are tolerably evenly distributed, are compared with those of the times of Henry III., in which the best and most discerning men like Pembroke and Montfort, are wrecked on the unfinished constitution, yet even in these struggles the progress of the constitutionally organized State is evident. In this crisis the heads of the ruling classes to their own risk and at their own responsibility step into the gap; but the ringleaders pay the penalty for their excesses with their lives and property—a course of affairs which continued down to later centuries, and which has preserved to the aristocracy, together with their honour and their influence, the heavy responsibility of a ruling class. With the support

tutes. The statute of Acton Burnel (13 Edw. I.) begins with the words, "The King in person and his council have decreed and determined;" the statute Westminster 3, "Our lord the King in his Parliament, at the instance of the great men of the realm, has ordered;" the statute *Quo Warranto*, "Our lord the King in his Parliament of his special favour and inclination towards his prelates, earls, and barons has granted;" the Statute of Assistance (21 Edw. I.), "Our lord the King in his Parliament hath decreed." On the other hand, Edward defends the statute of Mortmain to the Pope with the explanation that it had been made "with the advice of the magnates," and could not be altered without their consent.

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of the commoners the King again succeeded in shaking off the guardianship of the party of the nobles. All decrees of the Ordainers, so far as they violated the prerogatives of the Crown, were repealed, and it was solemnly acknowledged, that upon questions touching affairs of the Crown and State, resolutions could only emanate from the King himself, with the assent of the ecclesiastical and temporal estates.

Yet in spite of this, the weak and purposeless monarch, in consequence of the open rebellion of his criminal consort, was soon obliged to abdicate, and was murdered in prison. The person of the King, but not the kingly authority, had at this time succumbed to a combination, which proclaimed the deed of violence with the insolent words, "The King has forfeited his crown by reason of his incorrigible disposition," whilst the Archbishop of Canterbury announced these words to the people with the intimation that "the voice of the people was the voice of God." (2)

Edward III. (1327–1377).

In the name of the successor to the throne, a youth of fourteen years, a criminal but energetic faction carried on a regency, which after a few years perished by a bloody retaliation. With Edward III. the first parliamentary government in principle begins, which in thirty-seven of its fifty years' duration convened Parliament seventy times to short sessions, in order to arrange with them the entire affairs of the realm. Even in the first years both Houses began to display lively activity both in external and in internal affairs, under a council of regency appointed by Parliament. The King, after attaining his majority, acted with the assistance of his

(2) As to Edward II.'s Parliament, *cf.* Parry, 70–91; Stubbs, ii. secs. 245–255, as well as the detailed accounts in the Peers' Report. The complete history of the Ordainers (5 Edw. II., *seq.*, Statutes of the Realm, i. pp. 157–167) needs a full exposition in order to enable us to appreciate the practical progress which was made by the ruling aristocracy since the days when the Mad Parliament at Oxford made the first attempts at ruling the realm by a committee of nobles. But the constitution in the form it then wore was not as yet fitted for enduring a party government of this description for any length of time.

Parliaments, throughout his long reign, under circumstances frequently difficult, with energy, discernment, and renown. During this half-century all the elements of power advance into the foreground at times, and then yield in their turn to a union of the opposing forces in constitutional struggles. On the one side we still meet with usurpations of the personal rule in matters of imposition of taxes, enforced loans, enforced levying of recruits and ships, extension of forests, arbitrary fines, and beginnings of an administrative jurisdiction by the Lord Chancellor; and then again endless national grievances, confirmations of Magna Charta, and of the right of granting taxes, restrictions of the laws of high treason, and limitations of the exercise of sovereign rights by the legislature. Violent encroachments by the estates on the royal right of appointment; on the other side, express and effectual rejection of them. Protests against a penal jurisdiction of the council in 25 Edward III.; then again express recognition of the same, particularly in the feuds with the Church. There arose at this time a kind of equilibrium of forces, in which Lords and Commons develop their inherent energy.

Legislation holds its customary course, with the participation of the Commons; the initiative is gradually shared between them and the monarch.

Taxation by Parliament attains a fixed form; petty encroachments upon it are given up by the Crown; at the close of the reign a confirmation is again made.

The *control* of the central administration by Parliament takes a peaceful, though at times an overreaching course. The events of the reign of Edward II. raised the pride of the estates to such a pitch, that even the King, when he had attained his majority, at times yielded. In 15 Edward III., after the failure of a foreign undertaking, the Parliament begins with stormy complaints about the taxation of the clergy, as well as about the appointment of the council and of the highest officers of the realm, which had taken place without their consent, with the claim that a "peer of the realm" could only be condemned to the loss of his rights and

his possessions by his compeers. All great officials should at the beginning of Parliament lay down their offices for a short time, to render the lords an account of their behaviour, etc. All these demands are granted in return for a subsidy of twenty thousand sacks of wool. But after the close of Parliament the King issued a proclamation to the sheriffs, and declares that that statute had been wrung from him in violation of his prerogative and the law of the land, in circumstances under which he could not have done otherwise than "feign," and that in consequence he repealed it after deliberation in his council. Two years later the Parliament also declared the statute repealed. Another attempt by the estates at encroachments (30 Edw. III.) was retracted in the following year. Nevertheless the senile monarch ended his days in disquietude. In 50 Edward III. it was moved, that since the present officials were not fit for their offices, the council should be increased by ten or twelve bishops, lords, and others as permanent members, and important matters only decreed with the consent of all. At the same time appears the first case of an impeachment by the Lower House. The Parliament of the ensuing year, however, let this measure drop.

The result of the century of the three Edwards is the more distinct limitation of the functions and powers both of Church and State, in political government and assembly of the realm, in Parliament and convocation, in legislation and the administration of justice, but more especially in the firm establishment of the rights of Parliament in all their three directions. But with these manifold collisions are linked the increasing prosperity of the realm, as also the development of external power, which in the wars against France gains for the English arms the first rank among the European feudal states. (3)

(3) Touching the Parliaments of Edward III., *cf.* Parry, pp. 92–137; Stubbs, ii. secs. 256–264. The great material of the precedents has been exhaustively treated in the Peers' Report, and in Hallam's "Middle Ages." The events in 15 Edward III. receive their naïve character from the severe embarrassments, in which the King had involved himself, not without

Richard II. (1377–1399).

A grand epoch of the monarchy is again followed by a period of kingly incapacity. In the name of the ten-year-old King the council of prelates and barons grasps the reins of government. The Commons were encouraged by the parties at the court itself to participate therein to a certain degree, and their action soon makes itself felt. The ruling council consisted of three bishops, two earls, two bannerets, and two knights. Chancellor, treasurer, chamberlain, justices, and other supreme officials were to be appointed during the minority "in Parliament;" but, as a matter of fact, the government remains in the hands of the great council. On the ground of ever-recurring complaints as to military expenses a motion was now brought forward for the rendering of an account of State disbursements, and this was frequently repeated during the reign. As early as 3 Richard II. a proposal was made to dismiss the regency, and appoint in its stead the first five grand officers in Parliament; but this was not acceded to. The motions of the Commons, which were often of a radical character, are explained by the weakness of a disunited government, and by the encouragement which the ambition of the Earl of Lancaster and other lords of the court lent to such demands.

The King, who at first made great promises, begins his personal rule with unusual grants to favourites (the Earl of Oxford, Michael de la Pole). As early as 10 Richard II. the Parliament begins to threaten. The King, giving way, deposes and fines his chancellor, and grants a commission for the general revision of the administration. In 11 Richard II. it is brought forward as a ground of complaint, that the officials have constantly induced the King to convene assemblies "of certain lords, justices, and others, without the consent and presence of the lords of the great council." The

blame, by his undertakings upon the Continent. It was evidently the twenty thousand sacks of wool which induced the King to make the thoughtlessly pronounced, and irregularly retracted, concession.

royal chamberlain is arraigned. The promise is given that no letters shall be issued under the signet or privy seal to the prejudice of the realm or disturbance of justice. The royal justices are even condemned to death.

These events were followed by an era, in which the dukes of Gloucester, Lancaster, and York contended for the government in the name of the pleasure-loving, indolent King. But by spasmodic moments of personal energy, by surprise of his antagonists, and through the support of the Commons, a reaction was brought about in which Richard II. apparently regained his full authority. A Parliament surrounded by armed men repealed all the decrees of former years which were aimed at the royal prerogative, granted the King a considerable subsidy for his life, and lent support to every bloody persecution and retaliation, and even to the appointment of a parliamentary committee, which was to remain sitting after the close of Parliament, endowed with decisive functions and exorbitant powers, which were certainly at once abused, and in later times disavowed by the cancelling of all the ordinances, judgments, and measures of the committee. But Richard did not know how to make other use of his regained power than by employing it for malicious retaliation and measures of personal arbitrariness; by a series of proceedings the ill-advised King again revived the semblance of an absolute rule, so that he found himself suddenly forsaken by Parliament, Church, and people, and succumbed to the attack of the Duke of Lancaster, who, landing at Ravenspur with a force of sixty men, after a few weeks stood at the head of the discontented magnates and of an army of sixty thousand men.

The result of this period are encroachments of the Lords upon the appointment to offices, while the Commons gain important precedents for a control of the State disbursements; in both Houses impeachments of the great officers are frequent. The administrative law is pervaded by a double tendency. On the one side is found the endeavour of the estates to limit the discretionary power of the "King in council." On the other, extensions of the official authority in lower depart-

ments, especially the extended jurisdiction of the justices of the peace over the labouring classes. On the occasion of the great rebellion of the peasants a summary intervention of the council took place without opposition. To satisfy a real national want, the equitable jurisdiction of the Chancellor at this time became formed. But the most important event of the period with regard to subsequent consequences occurred at its close, namely, direct revolt and formal deposition of the monarch by a resolution of both Houses of Parliament. (4)

Henry IV. (1399–1413).

The reign of the first sovereign of the house of Lancaster begins with the unsurmountable difficulties arising from an usurped power, surrounded by conspiracies, rebellions, and external perils. As the feud-loving magnates regarded this dynasty as their own creation, their powerful partisans soon vied with the old foes of the house in combating the new King. The records of the council afford us an idea of the sorrows which brought the energetic and courageous monarch to an early grave. A king in this position, surrounded by pretenders with titles equal or superior to his own, was fain to be content to maintain the *status quo*. There is accordingly no more mention of taxes without Parliament, not even in severe administrative crises. In 6 Henry IV. the subsidies were only granted upon the condition that the moneys should be received by a treasurer sworn in Parliament, and that in the next sittings an account of the expenditure should be

(4) As to the Parliaments of Richard II., see Parry, 138–159; Stubbs, ii. secs. 265–270. On his accession the want of a regency law was felt, in consequence of which deficiency the *Magnum Concilium* itself actually discharged the functions of a council of regency. The consequent dissensions and quarrels are associated with the dangerous rebellion of the labouring classes, a rising which, for want of a ruling power, was dealt with by the wealthy classes after their own fashion, and, having been provoked by unjust measures, was suppressed with cruelty. The Parliaments regard it in no other point of view than to complain of the mutinous behaviour of the villeins and of their refractory refusal to perform the services due from them. However, in the province of taxation as in that of the discharge of civil and police functions, the discernment and good behaviour of the wealthy classes soon return to the English self-government.

rendered. In the same way in 7 Henry IV.; here, however, the King again rejected the demand that the petitions should be answered before the money was voted. In 8 Henry IV., thirty-one weighty articles followed, all of which were acceded to. The King must appoint sixteen counsellors, and allow himself to be exclusively advised by them, and not dismiss them unless they are convicted of an offence. No judicial or financial official may be appointed for life, and no petition presented to the King except in council. Numerous abuses in the council and in the administration of justice were enumerated and prohibited. The Court faction, if it incites the King against his subjects, must be removed and fined. (Four persons of the King's courtiers had before this been removed with assurance "that the like should happen to every other person who should arouse the discontent of his faithful subjects"). For the due maintenance of the laws of the realm, neither the chancellor nor the keeper of the privy seal shall allow anything to pass under the seal in their keeping, either a warrant or a grant of letters patent, a judgment, or any other matter, which should not so pass by law and right, by which regulation the keeper of the privy seal was now also made liable to immediate impeachment by Parliament. In the next Parliament, however, the King sent a message to the Commons to the effect that a statute had been passed in the preceding Parliament which violated his liberty and prerogative, and that he now asked their consent to its repeal. The Commons accede to this, and receive the King's thanks in return. Still more regard had to be paid the Church. One of the reasons of Richard's overthrow was his indulgence towards heresy. Upon the demand of the Church the King accordingly launched the stat. 2 Henry IV. c. 15 against the Lollards, with the assistance only of the great council, and in spite of the opposition of the Commons. The new position of the monarchy was especially favourable to the consolidation of the peerage. A king, whose throne was based only upon the recognition of Parliament, could no longer treat the House of Lords as an

assembly convoked by his own plenary and discretionary powers. The inheritable right of those summoned by custom to a summons to Parliament was accordingly acknowledged. The Commons are also favourable to it; in return for which complaisance the Lords recognize the right of the Commons to vote subsidies, and their co-operation in making statutes, yet with reservation of the exclusive jurisdiction of the Upper House. What could be said against these mutual recognitions? Both Houses acknowledged, in consideration of them, that Henry was the rightful King of England. The supreme jurisdiction of the House of Lords was now expressly sanctioned, the mere official elements receded into the position of deliberative members. The procedure in both Houses now adopted a form resembling that of the present day. But the whole issue resulted most decidedly in favour of the Lords, whose military ascendancy was felt to be a consequence of the great French wars. (5)

Henry V. (1413–1422).

The popular and glorious reign of Henry V. in like manner moves within the limits of parliamentary privileges. The great struggles in France give the political activity an overwhelming impulse towards foreign affairs, under which legis-

(5) As to Henry IV.'s Parliaments, see Parry, 159–170; Stubbs, iii. p. 1–72. At the outset the difficulty is felt of altering an hereditary succession to the throne by deliberative assemblies periodically convened. The Parliament of Richard II. had, as a *Consilium Regis* of Richard, ceased at his deposition. Richard's Parliament could not therefore legally become the Parliament of Henry. Hence the several members of the former Parliament were all assembled, but only as a "convention," and after a few days new writs of summons were issued to the same persons to form a Parliament in the name of King Henry IV. But by such fictions the jurists could be more easily quieted than the Percys and the great martial noble families, who, in league with the Scots and the Welsh, worked just as zealously for the overthrow of the dynasty as they had before done for its elevation. In the struggle for self-preservation, Henry IV. rode rough-shod over single constitutional forms, as on the occasion of the summary execution of the Earl of Nottingham and of the Archbishop of York, when they had been taken with weapons in their hands. But, with regard to both Houses and to the interests of the nation, the Government conducted itself with such parliamentary correctness, that among the manifold encroachments of the Houses upon the royal privileges, there was yet found no occasion for an impeachment of ministers.

lation and business in Parliament for some time rests. The somewhat needy state of the financial resources of the Government demand frequent money grants. In 10 Henry V. the Commons are convened to take part in negotiations touching the league with the Emperor Sigismund and the treaty of Troyes, after a great council has declared itself incompetent to deal with these subjects. In harmony with the Church, and with the liveliest sympathies of the nation, the dynasty especially consolidates itself by the brilliant successes of the war in France. (6)

Henry VI. (1422–1461).

Under this name a regency again begins its sway, this time over the person of a child of nine months, who, owing to an unfortunate deficiency of intellect, was destined to remain all his life incapable of forming a single resolution. Contrary to the testamentary dispositions of Henry V., the Duke of Bedford was appointed not *regent*, but *protector* and *guardian*, with the Duke of Gloucester as his substitute. The affairs in France, which had become critical, were conducted by Bedford until his death (1434), with a firm and experienced hand. The internal government of the country was managed with a certain degree of security and regularity by an extraordinary council of the King appointed by the Lords. The situation of the realm had meanwhile become critical; financial embarrassment had become urgent; but the affairs of the State were for a long time worthily conducted by ruling nobles. The numerous regulations of the council, dating from this period, testify to the regular course of State business, which was so ordered that a certain and responsible official was

(6) As to the Parliaments of Henry V., see the comparatively sparse matter in Parry, 170–175; Stubbs, iii. 72–91. There occur again under this reign acts of a personal penal jurisdiction, where such was allowed to be reserved according to feudal principles, and other individual acts of personal rule (Nicolas, ii. pp. 29, 30). Several lords were condemned without judgment of their peers by judge and jury, on account of a conspiracy against the life of the King. A summary penal jurisdiction of the council and the chancellor *ex delegatione* of the council was expressly recognized by 2 Henry V. stat. 1, c. 9, in cases of murder and manslaughter.

appointed for each principal department. The insufficiency of the rule by the nobles without monarchical guidance, however, became gradually apparent in the bitter enmity between the Duke of Gloucester and Cardinal Beaufort and his powerful adherents. The hostile party found in Margaret of Anjou not merely the queen of its choice, but also a party-leader uniting manly spirit with feminine craftiness. The murder of the Duke of Gloucester (1447) gained for the Court faction thus leagued together the sway over the country in the King's name, but at the same time brought upon it the bitter hostility of the Duke of York and his partisans. The merited unpopularity of the Government led in its turn to the impeachment and murder of the Duke of Suffolk (1450).

In the party passions, which had been now kindled on both sides, the first schemes of the house of York for a succession to the throne were displayed, to which this branch of the royal family stood certainly nearer, after the death of Richard II., than the younger line of Lancaster. From the death of the Duke of Gloucester (1447) all had gone badly in the State; Henry the Fifth's conquests were lost; and though the constitution was safe, the administration at every step failed in its duty; the Crown was impoverished, the Exchequer empty, the peace of the country never well maintained, the law never well administered; life and liberty of the subjects were insecure, whole districts in constant dread of robberies and tumult, and the local government either weakened by factions or in the hands of some great lords or a clique of courtiers (Stubbs, iii. 270). As early as 1454 the mental disorder of the King led to a first protectorate of the Duke of York, which again came to an end at the monarch's apparent restoration to health. The major part of the nobility held firmly in old feudal allegiance to the house of Lancaster. The opposing party consisted of the Duke of York, the greatest landowner in the realm, in league with the great family of the Nevils and the city of London, and apparently commanding the sympathies of the majority of the municipalities. The difficulties and financial distress of the Govern-

ment had meanwhile accumulated. The murder of the Duke of Gloucester, at the instigation of Margaret, gave the signal for the future action of the dynastic parties, who in consequence of the wide ramification of the royal family by marriage with the great nobles, represented two great opponents almost equal in power. With difficulty were the parties kept within bounds for a few years by the constitution and the outward reverence paid to the Crown. So soon as this barrier was removed by the hopeless imbecility of the monarch, a furious conflict breaks out, in which both parties contend not against, but for the possession of royal power—a struggle in which acts of self-preservation, of violence and revenge soon become almost inseparably entangled. (7)

(7) As to the Parliaments of Henry VI., see Parry, pp. 175–189; Stubbs, iii. pp. 94–181. The first decades still give, in the face of the accumulating difficulties, a testimony of the capacity of the nobility for rule. It was not until the second half of the reign that the political organization slowly collapsed. As early as 23 Henry VI., Suffolk, in anticipation of coming events, refused to conduct the marriage negotiations with France. On this matter there was passed in advance a kind of indemnity bill, confirmed by both Houses and the King, but which did not afford any protection against the subsequent impeachment of the minister. The unrestrained struggle that was now brewing resulted from a degeneration of that military organization which was the outcome of the great wars upon French soil. The royal paid soldiery flocking homeward in thousands upon thousands were only too readily absorbed by a newly organized military system of the great wealthy nobles, which became formed after the beginning of the French wars under the name of "the liveries," and in which the warlike passions of the Middle Ages now burst forth in England. Under "livery" was originally meant the furnishing of officials and servants of a great householder, prelate, monastery, or college with clothing and means of subsistence. The clothing now took the character of a uniform and badge of service; and the greatest possible number of servants and dependants was looked upon as a proof of a high and aristocratic position. The livery was accordingly given to all who were willing to wear it, as the sign of a great following and of an influential position. The liveries became therefore badges of union. The lords wore one another's badges out of courtesy. But before all the liveries became the counter signs of the great court parties, and the emblems under which the battles of the great dynastic factions were waged (Stubbs, iii. 531, 534). With this was connected the frequent fortification of the residences and castles of the magnates, which though really dependent upon royal licence, after the times of the barons' wars had been permitted in numerous instances, especially under Edward III. It was precisely the contrast between the strictly ordered life of the English county and the adventurous camp life which had lasted so many years in France, which awoke afresh in the chivalrous part of the great nobility and the knighthood the daring and martial spirit of the Middle Ages, and the pride and insolence of the knighthood towards the peaceful classes, and made this epoch a brilliant era in heraldry and in family pride. These retinues of the nobles concurred in a most remarkable manner with the stream of veterans returning

The battle of St. Albans (1455) opens the thirty years' war of the Roses. After a short period of apparent peace, the King became, in 1460, a prisoner in the hands of his opponent, who with great moderation brought about a decision of the Upper House, which recognized the Duke of York as Protector, and after Henry VI.'s death as his successor on the throne. But the Duke, surprised by a strategem of the Queen, was overcome, and the victorious party gave the signal for the execution of the captured opponents according to martial law, and for unceasing massacres and violence, which in the very next year brought about the overthrow of the hated Government. The powers of the King's council and the whole movable part of the political constitution became disunited in this great struggle; in which, in fact, there was no question of a struggle for constitutional principles. Only so far as the house of Lancaster had gained the throne by its alliance with the clergy and Parliament, did the traditions of the Church and of the high nobility stand more upon this side, and those of the Commons more upon the other. Moreover, no ecclesiastical legal authority could inform the people upon which side the right to the crown lay. In truth, each fought for his share in the political power, and for retaliation and revenge. Through Parliament no independent solution now appeared possible. Each one was subservient to the victorious party by which it was summoned, and condemned the other. Upon the temporal side the prime cause of the confusion lay in the military organization of the retinues of the great lords, the

from the French wars with their successful experiences in field tactics, supplemented with the use of heavy artillery, before which the old glory of the bowmen had began to pale. The issue of the struggles, with such a mixture of warlike elements, was dependent upon surprise and accident to such an extent, that the battles of the following period mostly ended in massacres, and were decided in a few hours. In connection with this condition of things now begins the series of laws relating to liveries and maintenance, and first of all in 31 Henry VI. c. 2, the recognition of an extraordinary penal jurisdiction of the council in cases of "great riots, extortions, oppressions, and grievous offences," especially in the case of violent acts of the magnates; disobedience to the council is to be punished as contempt of the King, in the case of a peer with loss of his goods, his offices, and of his seat in Parliament. This regulation was only to be in force seven years, but it became a precedent for the later Star Chamber.

"liveries," now forming the uniformed corps of extemporized leaders, increased tenfold by the enlistments of soldiers of the armies returning from France, and these made the issue of the battles altogether incalculable. The county militia formed no sufficient counterpoise, so long as it was opposed to the masses of the more skilled warriors who were perpetually streaming back from France. Upon the ecclesiastical side the mischief lay in the indifference of the Church, in which personal religion had become lost, whilst the higher clergy, without any guiding principle, recognized every political power which recognized their worldly possessions. As among the confusion of the barons' war at the close of the preceding period, the higher clergy made themselves conspicuous in the persons of a few distinguished individuals, so did a change in the intellectual and moral education of the epoch announce itself in the fact that this period of wild struggles appears as an "era of great jurists," in which lord chancellors and justices of the realm make themselves famous in a time of violent barbarity, without however being able to secure the course of justice from serious abuses. (7ª)

Edward IV. (1461–1483).

The victory of the White Rose over Margaret of Anjou brought the heir of the house of York upon the throne. The bloody conflict of annihilation waged by the high nobles among

(7ª) The first protectorate in 32 Henry VI. was made constitutionally revocable *durante bene placito regis*. The second protectorate was appointed for an indefinite period, until the duke should be relieved of it by the lords in Parliament. The members of the council became more fluctuating. Even in the previous year fifteen members had been dismissed, and, on the other hand, five adopted into it from the party of the duke. The claim of the house of York to the succession was already expressly proclaimed. With the consent of the nation and of Parliament, the house of Lancaster, for a period of sixty years had sat upon the throne of England, with the support of the Parliaments. It had long and gloriously fulfilled the duties of the monarchy, and entered with two generations of Englishmen into the bond of mutual faith, protection, and allegiance. Could a claim of the older line be now entertained? But the King was notoriously incapable of governing, and in his name the persecuting spirit of Margaret had, after her victory of 1460, begun a system of executions, confiscations, and actions for treason, which left the house of York, its party and partisans, according to the law of self-preservation, nothing but a recourse to arms, and to the nation scarcely any other choice than that of siding with one or the other party.

themselves and particularly the indifference of the Church and of the masses to the aristocratic parties, made Edward after a short interval lord of the land, in a time of deep demoralization, in which the existing contrasts of the English Middle Ages came to a violent issue. The long French wars, in spite of all their brilliancy and glory, had proved a hopeless undertaking. The European position of England demanded a final settlement with the Continent, which at last resulted in favour of the French nation, and once and for all decided the national isolation of England and its position in the European family. In the course of some decades of war upon French soil, a race had grown up which no longer found room in the peaceful counties and towns of its native home. Grown turbulent through the effects of camp life and of a course of plunder and extravagance, the lords now returning home found it even harder to settle down in their native country than did the thousands of hirelings. In the sober local government, in the English military, judicial, and police administration there was no longer a field for military ardour and plunder. Now that these elements were thrown back in large numbers upon England, the struggle of the rival noble factions found in the soldiery accustomed to their leadership only too ready a material, out of which every rich and popular leader could frame for himself armies for civil war. Owing to the contested title to the Crown a party standard was found for all factions. The wild aristocratic struggle owed its peculiar character precisely to the alliance of all the great noble families with the wide-spreading royal house, and to the centralization of all political power in the King in council and the King in Parliament. The politic head of the Yorkists, representing the interests of the boroughs and the country's need of rest, gained the victory at the expense of the great families of the land. Supported by the Commons, Edward IV. declared the rule of the kings of the house of Lancaster to be usurpation, the Lancasters, Somersets, Exeters, Northumberlands, Devonshires, Wiltshires, and in all one hundred and fifty-one nobles, knights, and clerics guilty of high treason; not by

judgment of a court of law, but for the sake of shortening the proceedings, by "bill of attainder." One-fifth of the land fell by outlawry and confiscation into the hands of King, who restored a personal rule with pitiless severity. But in marvellous contrast to the former period, there is seen, amidst all the confusion, the coherence of the firm elements of the present political system. Amidst the din of arms, courts of justice, itinerant justices and juries went on in their usual course, and the jurisdiction of the Chancellor was enforced against fraud, deceit, violence, and disturbance of possession by decrees of *probatio in perpetuam rei memoriam* and *habeas corpus*, and this whilst the nobles fought in the King's council with intrigues, and in open field with drawn swords. (8)

Edward V., Richard III. (1483–1485).

The royal power of Edward IV., so cruelly gained and so mercilessly exercised, fell after the murder of his sons to the usurper Richard III., who in vain endeavoured to expiate by popular concessions his heavy crimes against all the laws of

(8) As to the Parliaments of Edward IV., see Parry, 189–194; Stubbs, iii. 188–190; and iii. c. 18, "Lancaster and York"). The entire barrenness of all the contemporary histories extends also to the parliamentary proceedings, which are mere registers of private bills and petitions of trade. It is the first Government under which no single statute was passed for the protection of personal liberty and for the redress of national grievances, although in this reign the administrative abuse of the so-called "benevolences" begins for the purpose of defeating the right of granting taxes. It is a reign of terror by reason of the ruthless exercise of the extraordinary judicial and police powers, which kept the proscribed adverse party under constant surveillance, though the descendants of the party leaders who were condemned to death and confiscation were for the most part restored by parliamentary decree to their right of succession. The condition of the realm under Edward IV. was actually one of war, although in name it was under a government acknowledged by Parliament. Thus can be explained the employment of courts-martial under the King, especially the much-talked-of patents of 1462 and 1467, by which a provost-general was appointed, "*ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis cæterisque causis, quibuscunque per præfatum comitem ut constabularium Angliæ, seu coram eo, motis, movendis seu pendentibus et,*" which Lord Coke considers contrary to the constitution (Inst., vi. 127), and from which proceeded the controversy respecting the admissibility of courts-martial in times of peace. The occasional precedents for execution without trial of captive opponents which occur under Henry IV. and V. are followed in the wars of the Roses by frightful consequences. Occasional instances, too, of the use of torture in criminal proceedings are met with in this reign of terror, but cannot be regarded as the regular procedure of the courts.

God and rights of man. After the organized military power of the higher nobility had collapsed, the chief importance for a short time centred in the House of Commons, which, however, with the exception of a bill against "benevolences," showed activity only in the matter of penal prosecutions and private bills. Forsaken by the greater part of his adherents, Richard III. succumbed to a coalition of the remains of the two factions of nobles, and lost, by violence and treachery, to the new house of the Tudors, the throne which he had hardly gained. (9)

The monarchic power emerged from this hideous struggle with a title that could not be practically disputed, and with an undiminished supremacy. But when the blood shed in the struggle of the rival noble factions had ceased to flow, the Lower House had attained that full equality of power with the weakened Upper House, with which this period closes.

(9) As to the Parliament of Richard III., see Parry, 194; Stubbs, iii. 226, 233, 234. What is outwardly incredible in the criminal career of the tyrant is psychologically explainable as being the incarnation of a deeply demoralized time, in which, together with the extinction of all principles of law, all moral restraint became loosened by the decay of a Church which even responded to the flatteries of Richard III. The repeated attempts to clear the character of Richard III. have all failed. The dramatic masterpieces of Shakespeare, dictated as they were by tradition and knowledge of the English character, may be regarded as an historical sketch of this period. At the close of the wars of the two Roses, men had to tell of twelve pitched battles, and of eighty princes of the blood royal who lost their lives in the battle, by the hand of the executioner, or by murder. Moreover, authentic history is enough to show that in this tragic period blood-guiltiness and retaliation follow one another with marvellous constancy. In the main the picture given by Stubbs (ii. 306) may be regarded as a mirror of the whole period. "It is a period of private and political faction, of foreign wars, of treason laws and judicial murders, of social rebellion, of religious division. . . . The barons were no longer feudal potentates, with class interests and exclusive privileges . . . but leaders and allies of the Commons, or followers of the Court. . . . The royal policy had placed the several branches of the divided house at the head of the great territorial parties."

CHAPTER XXVIII.

The Three Estates of the Realm.

Usurpations and dynastic struggles veil the process of the legal formation of the estates, which was being brought about during this period in a quiet and unbroken course, according to the sound principle of the Middle Ages, that of basing the privileged position of the higher classes upon their performances in the personal service of the State, and upon the amount of their contributions to the revenue. The merit of having successfully established this legal order belongs again to the monarchy. The words of Edward I. in the struggles for the consolidation of his island-realm were not forgotten, when he demanded of his faithful *communitates* that they should meet common perils with united resources, and take counsel with the King when the military and financial forces of the Government required to be increased "*ut quod omnes tangit ab omnibus approbetur.*" The truly royal idea which influenced Edward I. and Edward III. is the combination of all antagonistic elements of society in a free activity in the service of the State, and the association of the people in the great tasks of the State, internally and externally, including every class of society capable of co-operating in the work.

It is now the prelates and the temporal magnates who, by reason of their performances in the service of the State, represent a ruling nobility,—the middle classes (knights, freeholders, boroughs), who, according to the ideas of rank in those times, form a regular third estate—the three now legally

recognized *status civiles* of the English parliamentary constitution—on whose account this period is described as the period of the "estates of the realm." As, however, lords spiritual and temporal are bound together by essentially uniform rights, and on the other hand the knighthood is distinguished by certain privileges from the rest of the commoners, in this chapter we distinguish :—

I. The estate of the spiritual and temporal peers;

II. The estate of the landed knights;

III. The estate of the freeholders and burgesses; to which may be added, IV., the whole of the rest of the community as *infra classem*.

I. **The estate of the spiritual and temporal magnates** has now, as a result of the position they had actually attained under Henry III., come to be a legally recognized estate of the realm, by the formation of the *Magnum Consilium*, which conceded to them a personal share in the conduct of all important business, and with it the highest political privilege of the time. For the spiritual lords a seat and vote in the great council is connected with definite high spiritual offices. In the case of the temporal lords the right is, as a rule, inheritable by the firstborn son, or even by some other heir, according to the wording of the patent granting the peerage. To the old rights of the English feudal tenure this political right was only added as a fresh privilege by personal grant from the King on the formation of the *Magnum Consilium*. In consequence, the justices in 7 Henry VI. assumed that the claim to the name and title of a peer (as a right of property) belonged to the jurisdiction of the common law courts, whilst the claim to a seat in Parliament must be determined by the "King and the peers," the latter as a new creation of the *jus publicum* (Nicolas, Privy Council, iii. p. 58).

The spiritual peers, now generally consisting of two archbishops, nineteen bishops, twenty-seven abbots, priors, and masters of orders, have, according to old usage, precedence of the temporal peers, the archbishops of the dukes, the bishops

of the earls. Their right to a seat and vote in the great council is perfectly equal to that of the temporal lords. Their legal privilege of being judged by the Upper House has not arrived at any regular development, because, not without reason, they considered the claim to the privilege and benefit of clergy as more valuable. Moreover, their social position has remained on an equality with the pretensions of the temporal lords, which have now risen high. The archbishops keep up their establishments upon the same scale as the dukes, the bishops live like the earls. They hold their court with as numerous a staff of officials, servants, and followers, and travel like the temporal nobles with an armed retinue and great train. Though their interest in the army is less, yet on the other side they have a proportionately firmer position in the leadership of the Church, and in their personal experience in conducting the higher administrative business.(1)

The temporal bench of peers consists at the close of the period of the five degrees of dukes, marquises, earls, viscounts, and barons, numbering under Henry VI. about forty or fifty in all. They have at the close of the period attained the hereditary rank for which they have long striven, in the legal form of a royal grant by patent, which at the same time defines the order of descent. Side by side with the peers by patent, there still appear certain *barons by writ*, though in continually diminishing numbers, for whom the hereditary summons is dependent upon custom. Besides these, there still continues a small number of personal summonses, particularly for bannerets of the army then existing, which in the course of this period come *de facto* to an end. The most illustrious families in the land form at the close of the Middle Ages an

(1) In extent, the baronies and knights' fees of the prelates were at this time certainly rather less than that of the lords temporal. Many bishops and abbots possessed by knights' tenure not nearly as much as belonged properly to a barony, according to the Exchequer scale, but only single knights' fees according to the old valuation. The number of their under-vassals now appeared to be remarkably diminished, as the spiritual lords had in course of time to a great extent evaded the actual furnishing of feudal troops, or had obtained express exemption. The Bishop of Lincoln, who under Henry II. was required to furnish sixty horse, was reduced by Edward I. to five; the Bishop of Bath from twenty to two, and so forth.

estate of nobles, yet one restricted to the most modest degree of birth-nobility, only passing to the eldest son, or the other legally entitled heir, without giving any right to pretensions to an ennoblement of blood, nay, under the express acknowledgment that all members of the family (except the wives and widows) belong to the class of *commoners*, and have no share in the privileged right of appearing before the peers' court, or in the other privileges of the nobility. (1[a])

Meanwhile, the numbers of the temporal peerage, as was the case in the former period, underwent the most frequent and considerable fluctuations. The great families of the Norman period had partly died out or been dispossessed, and had partly become connected by marriage and inheritance with the possessions of the royal family. After Edward I., the tendency was evidently to grant the greatest dignities and possessions of the earldoms, and *à fortiori* the recently created dignity of a duke, only to members, or at all events to near kinsmen of the royal house. Henry IV. sought to strengthen the usurped throne by the creation of a great family entailed estate, the legal results of which, to some extent, still remain. With this view the Duchy of Lancaster was formed, by union of the counties of Leicester, Lancaster, Lincoln, and Derby, that is, by union of the numerous demesnes situate therein, and of all those manorial and judicial jurisdictions, which were to secure the ducal house an influence in wider spheres. The "palatinate" jurisdiction of the duchy included, accordingly, a number of baronies in the most various counties. In effect, this accumulation of the possessions and family connections of the great families of the land had only one result, that it involved the whole of these elements of influence in the fall of the royal house. The great baronies of Buckingham, Norfolk, and Warwick, were almost equal to the royal possessions. For the purposes of the defence of the country, the greatest number of great

(1[a]) With reference to the slow and gradual origin of the hereditary peerage, and the numerous controversies respecting it, I may refer to the excursus to Chapter xxiv. See also Stubbs, i. 176. The courtesy title of the sons of peers is not legally recognized.

lordships was to be found in Yorkshire and the Welsh marches; the greatest number of small baronies in the southern counties. Whilst in the midland counties great baronies were less rich in lands, on the other hand the influence of the Crown had, in consequence of the manorial and judicial power of the duchy of Lancaster, become predominant. With the progressive development of agriculture the revenues of the great landed estates increased to an extraordinary degree. As early as the fourteenth century great landowners are mentioned upon whose estates were counted 24,000 sheep, 500 horses, and several thousand head of cattle. But with increased wealth enormous expenditure had also grown up, of which the Black Book of Edward III. affords us a graphic picture, computing the expenses of the royal household at £13,000 annually, of that of a duke at £4000, of a marquis at £3000, of an earl at £2000, of a viscount at £1000, of a baron at £500, of a banneret at £200, of a knight at £100, and of an esquire at £50. The expense connected with rank in aristocratic display at these times was shown in a great retinue of armed knights, chaplains, clerks, motley soldiers and servants in uniform, a display which was considered obligatory, according to the notions of rank in those days. The Court Calendar (the "Black Book"), claims for an esquire 16 servants, for a knight, 16; a banneret, 24; a baron, 26; a viscount, 84 (20 squires, 40 yeomen, 24 grooms); an earl, 130; a duke, 230 (6 knights, 60 esquires, 100 yeomen, 40 grooms, 24 stablemen). The retinue of the King himself was estimated only at about twice the number of the followers of a duke.

These manners of the times coincide in a singular manner with the military organization in the French wars, which has been discussed above. Under Edward III. a condottiere-system had begun, by which the warlike lords furnish, lead, and even train whole divisions for the great war. The flower of these divisions is formed of private court-officials, subvassals, retinues, tenants, and servants, who are joined by warlike freeholders from the county militia, trained to martial

exercises under officers of the knighthood. But the customary and military exercises give the barons a still greater ascendancy, for they find on their own estates the means to equip larger corps, and to drill them in the customary manner. Their dependants form the *cadres* of legions, which can easily be mobilized. It was certainly only the King who possessed the financial resources requisite for keeping together these masses for any length of time, by giving high pay. But the lords were at the same time in a position, by forming coalitions, to collect armies, whose sudden attacks the King under unfavourable circumstances was unable to withstand. Even after the close of the first period of the French wars, this danger showed itself under the unstable rule of Richard II., and, after many vicissitudes, led to the deposition of the King. Under his successor, we meet with feuds undertaken by the nobles, in which some few discontented barons, within a few weeks, advance against the King with armies of from six to eight thousand men (*e.g.* in 1405). The martial characters of Henry IV. and Henry V., knew how to curb this refractory spirit, and to divert its activity to the soil of France.

This military organization, combined with the tolerated fortification of numerous castles and manorial mansions, turned out quite as disastrous for the dynasty, as for the nobles and the country, in the outbreak of the furious war of the Roses. The two great dynastic factions, with their retinues of armed followers and hired troops, spread the party-spirit among the knighthood, the counties, the towns, and the parties in the Lower House, and finally split up the whole country into two camps of almost equal strength. Like an anachronism, the chivalry of the Middle Ages once again revived with all the mischief of private feuds, and all the ceremonial of a pedantic heraldry. The armed retinues in uniform (liveries), became at once the nucleus of a faction and a *clientêle*, which, with its powerful party machinations, interfered with the administration of justice and the maintenance of the peace, and after the era of the wars of the Roses moved the English legislature to proceed with laws,

frequently renewed and rendered more rigorous, against "liveries, maintenance, and champerty." (1[b]) This revival of the chivalrous feuds of the Middle Ages in no way harmonized with the legal organization of the military system, especially that of the county militia, nor with the strict discipline of the courts and the police, the position of the justices of assize, and the commissions of justices of the peace. But it was just this contradiction between the inclinations of the higher classes and the rules of law, which placed the high-handed fashions of the time in harsher and more overbearing opposition to the common law of the land. The adoption of the French language, manners, and customs, by the upper classes of these times is similarly connected with the French wars; but all this was nevertheless powerless in the face of the firmly established foundations of the English constitution, and the position of the third estate, and therefore it was that in the thirty years' wars of the Roses it hurried the baronial sway to its certain downfall.

II. **The estate of the knights,** or rather of the landed gentry, which proceeded from the blending of the lesser Crown vassals with the sub-vassals and great freeholders, has now won a prominent political position through the right of electing and being elected to the Lower House, in which latter it is a step in advance of the municipal burgesses. Its title to this position is based, as in the case of the peerage, upon personal service for the State, and upon the amount of taxes paid.

(1[b]) For the origin of the liveries the necessary data have been already given. The earlier statutes under the house of Lancaster had reserved to the King the right of granting liveries and badges of unions, as well as to allow the lords, the universities, the Lord Mayor of London and others, to put their servants in uniform. The lords especially had been allowed to distribute uniforms, hats, and emblems to armed soldiers, as well as to fortify their castles in great numbers: thus had the way for the catastrophe of the war of the Roses been unconsciously prepared. The protection of the great magnates was, in consequence of the badges of service, extended to an excessive number of quarrelsome followers, whom they themselves were unable any longer to control, and whose deeds of violence led to the oppression of the population around them, and who also when prosecuted by the criminal and civil courts, prevented the course of justice by the union of powerful bodies and the protection of the great lords (maintenance and champerty), and exposed the defenceless people to a powerful party-tyranny. A survey of this form of faction, and the legislation affecting it, is given in Stubbs, iii. secs. 470–475.

According to the gradually increasing uniformity in the imposition of the land and income taxes, the English gentry (very different from that of the Continent) was a chief basis of direct taxation, of which the knights' estates, certainly more than six thousand in number, according to the scale of the *feuda militum*, formed a principal factor. Although the knights' estates (regard being had to their *relevia* and other feudal dues) were taxed, as a rule, as compared with the boroughs, in a proportion of one-fifteenth to one-tenth, yet they remained, in this as in the following period, the principal contributors to the direct taxes of the country. (2)

Still more prominent and secure did the position of the knighthood appear, owing to their personal performances, in the now fully developed system of self-government. The military organization had, by a qualification of £15, arranged the knighthood as the first class in the county militia, and thus given it a prospective claim to the officers' places. In the constitution of the counties, the knights had ever formed the nucleus of the suitors; and in the formation of the *magna assisa*, and in the later extension of the jury system, they invariably remained at the head of the list of jurors. But the new institution of justices of the peace places the knights still more completely in an ubiquitous position at the head of the local government, to represent which, the knights, in their position as officers of the county militia, as jurors,

(2) The statistical authority for the feudal tenure of this period is the feudal book frequently cited under the name *Testa de Nevill.* It appears to have been compiled at the end of the reign of Edward II., or the beginning of that of Edward III., yet employing materials which according to official proofs date from the time of Henry III. and Edward I. It contains six thousand three hundred registered names of great and lesser Crown and sub-vassals. The latter, however, have been incompletely given; for where the immediate vassal makes his payments direct to the Exchequer, the sub-vassals are included in the summary statements. It is worth remarking that the great groups of estates, both in number and total size, when compared with Domesday Book, appear to have increased, whilst Crown vassals of a medium estate of from three to ten knights' fees are now seldom met with. In the above-named sum total are reckoned also the numerous "serjeanties," as well as the fiefs under wardships, and the escheated fees, which were under royal management. From this confused material, which is only intended for the Exchequer accounts, a graphic picture can at once be gathered of the splitting up of the fees into fractions, and of the intricate confusion of the greater landed estates.

and as police magistrates, had such a natural claim, that for generations we find the same names as representatives of their respective counties.

The executive had evidently a high interest in these services. But the State, as such, had no interest in restricting to certain families the claims arising therefrom, and in excluding all other classes from acquiring such rights. The English monarchy was strong enough and resolute enough to defend the true interests of the State in the formation of the estates of the realm, and thus to give the English aristocracy that sharply defined contrast which it presents to the formation of the inferior nobility in Germany and France, by following out the three lines of legislation laid down in the preceding period.

1. *By the alienability and divisibility of the knights' fees*, which had been already in Norman times permitted by royal licence, had been recognized again in Magna Charta, and was more clearly defined in the statute *Quia Emptores*, 18 Edward I. c. 1. For alienations of Crown fiefs the sanction of the King was still reserved, but the neglect to obtain it only entailed a moderate fine (1 Edw. III. c. 12). Herein the policy was evidently pursued of facilitating the division of great landed estates, multiplying the number of the Crown vassals and freeholders, and of entirely prohibiting for the future the creation of new manors, with their courts baron and police. A class-contrast between "noble" and "*roturier*" tenants of knights' fees after German fashion could never arise in England. But what was thus withheld from the ambition of the knightly families to keep themselves apart, as the propertied county nobility, redounded to the good of the knighthood as a whole, by according an enhanced political influence to the entire landed class.

2. The second legislative tendency was to *keep the honour of knighthood open to all liberi homines* who had possessions sufficient to enable them to learn and perform the heavy service of horsemen. In the interests of the national defence and the finances, a practice was begun by the Exchequer under Henry III., in 1254, of officially demanding

of all greater landed proprietors, under threat of penalties, that they should cause themselves to be made knights. The frequently changing practice demanded this of all possessors of freeholds, varying according to a scale of £10, £15, £20, £30, and £40 annual value, which last sum was finally fixed under Queen Elizabeth, in consequence of the altered value of money. These coercive measures had no particular effect, as the majority of landowners preferred paying the fine for neglecting to acquire the honour of knighthood; perhaps in order to escape the manifold burdens of the jury service and other duties. At all events, whilst a general obligation of the great landed proprietors was adhered to, the idea of an exclusive right in certain families to the dignity of a knight could not here arise. Pursuing the same tendency, the monarchy never permitted a limitation of the prebendal stalls in the cathedral and collegiate foundations to a narrow circle of privileged families, nor the assertion of proofs of nobility and other creations of so-called "autonomy," such as were built up in Germany on the impotence of the executive.

3. These were the reasons why the class of landowning gentry in England did not become a *hereditary order;* nevertheless, class privileges were accorded to them which harmonized with their actual services in connection with local government and the payment of taxes—an exclusive qualification for knights of the shire. The political right resulting therefrom, which in course of time was destined to become the most important of all privileges, was now, however, based upon the newer form of the county constitution, independent of the older rank in the feudal militia. The deputies were still called knights of the shire, but the new dignity of a county member was regarded as independent of the honour of knighthood. In quite early times we meet with numerous esquires among the deputies, who were, after the election, symbolically girded with the sword in the county court, in order to satisfy the letter of the law; at the close of the Middle Ages the majority were only esquires. It was in the nature of the case, that those landowners who preferred, as

justices of the peace, to devote themselves to agricultural pursuits and local interests, were just the men who, caring little for court duties, military adventures, and the honour of knighthood, should be chosen as deputies. The legal recognition of this well-acquired right was contained in 23 Henry VI. c. 15 (1444), to the effect that only notable knights and such notable esquires and gentlemen of the county were to be elected, as could become knights, but no yeomen and inferior persons.

Thus was a privilege conceded, as modest as that of the peerage, and not recognizing a greater amount of privilege of nobility than arose from the duties which the actual property rendered or could render, with certain still more modest honours extending only to the sons of the landowner, and no further. What was thus withheld from the aspirations of the individual families was again made good by the enhanced political influence of the whole class. The political position of the knighthood was recognized, without prejudice to family rights and social position. The country gentleman was quite as proud of his old family and coat of arms as the great baron, whose possessions often commenced centuries later than his. The esquire bore on his coat of arms a helmet and a shield, and had a very lively consciousness of a higher warlike vocation, even before he gained knighthood and the golden spurs. His younger sons generally received their education in the house of a nobleman, and he very frequently allied himself by marriage with the families of the higher nobility. But more valuable than these knightly honours stood the squire's influence in the district, in which his position was undisputed: in the offices and dignities of sheriff and justice of the peace; in county court and great jury, and also as representative of his county in the House of Commons.

An anomalous epoch, the way for which was prepared by the French wars, was ushered in under Henry VI. With French kinships and fashions, with French language and manner of life, new chivalrous manners spread from the higher nobility to the knighthood. The great dynastic spirit

of faction seized upon the counties. The outbreak of the war of the Roses recalled the period of club law under Stephen. Although the legal duel had been virtually abolished by the action of the legislature, yet the chivalrous notions connected with it did not die out. The Court of Chivalry had at that time attained a certain importance. The brilliant successes, the immense booty, the adventurous life of the armies in France appears to have once more introduced into an otherwise prosaic period all the romance of chivalry. Daily intercourse with the French nobility and their social views, and a camp life of many years' duration far away from home, naturally increased to a great extent both class pride and military *esprit de corps.* (2[a])

In spite of this transitory variation, the mainstay of the knight's position in the provincial district remained, unaltered and undisturbed, based on his activity in the life of the country. For this reason the knights appear, from the first, to have

(2[a]) The leanings of the English knighthood in this period have been described by me in an article upon the "gentry" in Ersch and Gruber's "Real-Encyclopädie." Under the influence of the great wars subsequent to Edward I., and especially under Edward III., certain movements in this direction were already working. Tournaments which were hateful to the prevailing public opinion, and which had been at times strictly prohibited, came again into honour under Richard II.; the use of escutcheons as family emblems had become an established custom in the French wars, and was under Henry VI. regarded as an hereditary right. Under Richard II., for instance, a patent occurs in which John de Kingston is designated as "*resceivez en l'estate de gentilhome et lui fait esquier.*" Under Henry VI. a certain Bernhard Angevin was raised with a formal "*nobilitamus*" to the inferior nobility. It was now a time in which the herald's office played a part with its rules of tournaments, shields, escutcheons, pedigrees, and in which pretensions to gentlemanly condition or degree were directly raised. In 29 Edward III. John Coupland was by patent appointed an hereditary banneret. Under Edward III. and Henry IV. the orders of the Bath and the Garter were founded. The ceremony of creating a knight was revived with great solemnity. The dignity of the banneret was for a time regarded definitely as a degree of nobility, and therefore it was that under the protectorate of the nobles in Richard II. the election of a banneret to be a knight of the shire was declared to be inadmissible. Occasionally also in the statutes of this time the characteristic of the *generosus a nativitate* was mentioned. Further than this, the legislation of Parliament never proceeded. The duties which the laws of the realm had already imposed upon the great landed proprietors in military, judicial, police, and tax-paying departments were all too serious and too burdensome to admit of attaching the idea of a nobility of birth to the mere descent from former owners of knights' fees. That tendency is only a transitory one, as was the system of paid soldiery. It is only permanent institutions which decide the question of class-distinctions.

had a regulating influence in the House of Commons. Though under Edward I. Norman names predominate among knights of the shire, yet by degrees English names become more constant. The same family names recur more and more regularly in Parliament, as well as in the parties of the court and the great council; and towards the end of the period the growing respect for the Lower House is manifested by the entrance into it of younger sons of the higher nobility. In the year 1549 Sir Francis Russell, son of the Earl of Bedford, was the first instance of an heir to a peerage taking a seat in the Commons. The knights of the shire are permanently the leading members of Parliament—an honourable and brave element which stamped its character upon the proceedings of the Lower House. The representation of the constitutional rights and liberties of the nation until the close of the Middle Ages was undertaken purely by the knighthood in the Lower House, where, as a matter of course, the Speaker was also chosen from among the knights of the shire. (2[b])

The so-called "educated classes" in England, as in Germany, come next after the knighthood. In a class system which bases its graduations upon landed property (or rather upon the services of real estate), all intellectual labour, as such, is still *extra classem*. Yet it, too, takes an important share in the functions of self-government, and thereby also a share in the privileges of the knighthood.

(2[b]) Only a seeming exception is the election of Richard Brook, member for London, to the Speakership (1454) by reason of the peculiar situation of London, and the permanent connection subsisting between the county of Middlesex and the city. Remarkable at first sight, in the violent party struggles of the magnates, is the apparently passive yielding spirit of the Lower House, and still more, as Stubbs (iii. 550) points out, the fact that the members of the servile Parliaments have sprung from the same class and frequently from the same families as those of the independent Parliaments. But in the dynastic struggles, especially in the wars of the Roses, right and wrong were for the lay understanding difficult to distinguish; even for a juristic mind the institution of a lineal succession to the throne, dating from many generations back, was something not very easy of comprehension. According to the situation of affairs then, there was nothing at last left even for the knighthood but to side with one party, choosing it according to their respective views of personal gratitude and loyalty, and to considerations of power and temporal interests.

Especially is this true of the *parochial clergy*. Whilst the prelates with their *tenure by barony* belonged to the noble estate of the realm, the higher parochial clergy shared the rank of the knighthood, and in convocation had their own parliamentary representation. By the appointment of parochial clergy upon commissions of the peace, they also participated in the political influence of that magisterial office. Next in order came the universities with their ecclesiastical institutions, their ecclesiastical staff, and their ecclesiastical privileges. For the whole body of the clergy, the benefit of clergy in cases of a criminal nature was a weighty privilege, which frequently led to immunity from punishment, and which at this time, by a declaration of the episcopal commissary, "*legit ut clericus*," could be extended to every person who knew how to write.

Even in the preceding period a juristic class had become separated, as a specially learned profession, from the clergy. The *serviens ad legem*, *doctor juris*, and the educated lawyer partook, like the lower clergy, of the honorary rank of the esquire, and found in the commissions of peace for the county a frequent occupation, independent of any real estate; the legal profession became more and more regularly the school for the higher judicial offices. At the close of the period the judicial staff consisted of a paid body of officers learned in the law. The clerical and liberal professions formed the complement of a higher middle class, which was in later times fitted for becoming fused with the knighthood into a single united body of gentry. (2c)

(2c) The parochial clergy bears at this time, like the knighthood, the honorary title "sir;" upon the justices of the realm was conferred the honour of knighthood, and even that of a banneret by royal grant. By an ordinance of 1 Henry V., according to which in every formal citation of the courts for the future the "estate or degree or mysterie" of the defendant was to be expressed, the additions esquire and gentleman from that time forth attained a technically acknowledged signification, especially for the legal profession, and the notables of the cities. Stubbs justly remarks on this point, "Two of the most exclusive and 'professional' of modern professions were not in the Middle Ages professions at all. Every man was to some extent a soldier, and every man was to some extent a lawyer . . . and he could keep his own accounts, draw up his own briefs, and make his own will, with the aid of a scrivener or chaplain" (Stubbs, iii. 596).

III. **The class of freeholders and municipal burgesses** formed, together with the knighthood, the now legally recognized third estate of the realm, defined by the active right of election to the Lower House, and founded like the other estates upon payment of taxes and personal service for the commonwealth.

The property base for freeholders entitled to the suffrage was real estate not liable to feudal services, in other words *free* (that is, only liable to money payments or definite services). Their original stock (the *liberi homines* and *sochemanni* of Domesday Book) had been already increased in the preceding period by the parcelling of knights' fees; and in this period it is multiplied in consequence of the extravagant pomp of the nobility and the knighthood, which was sure to lead to manifold alienations of portions of their estates, and to mortgages. The share in the land and income-tax of these small landed proprietors in the country and in the provincial towns was no inconsiderable one. But still more prominent was their personal service. The Statute of Winchester classified the *liberi homines* down to the lowest degrees for the service of arms. The uniformed liveries of the great noble households were formed of the members of their families. Of them were formed the heavy-armed horsemen, archers, and hobblers for the royal armies in France, which had so gloriously vanquished the ill-disciplined feudal levies of the French army, that a treatment of this class in England as being *talliables* and *corvéables* was forbidden, if on no other ground, by their military profession. But the regularly recurring suit of court, which now with the gradual dissolution of the county, hundred, and manorial courts, became more completely developed into service on juries, could not but decide the question of a legal assessment. From the first, in the civil assizes not merely knights but all *libere tenentes* had to be taken into account. The presentment jury and the petty jury in criminal cases, as part of the magisterial institution for police purposes, had from the first been constituted with a prospective view to a numerous employment of the smaller freeholders. The service on a jury was accordingly from the

beginning built upon a broader basis than that of the old legal suitors, who were, indeed, nominally, still summoned to the "county court." With Henry IV. begin new ordinances as to the mode of carrying out the county elections, in which at last the legal maxim that "political duties shall determine political rights," prevails. By the ordinances of Edward III. the duty of serving on a jury in the county court was fixed at forty shillings annual value on a freehold, whether in fee or for life. These freeholders formed with the knights the ordinary court of the county in its then form. With this qualification, which was tolerably high for those times, the third estate in the county separated itself off from all below it. (3)

A similar basis was originally also given to the municipal suffrage, apportioned according to participation in "lot and scot." The municipal privileges arising from the farming of royal dues (*firma burgi*), the regular grant of a separate police court (court leet), and still more extensive municipal jurisdiction led to the establishment of the principle that "all resident householders paying scot and bearing lot could

(3) The qualification of forty shillings is considerable when compared with the assessment of £20, which still continued as the rate of a knight's fee, in so far as it signified half a hide of land, a small yeoman's estate, or corresponding house property, with reference to which Fortescue mentions with satisfaction that in England a great number of such owners were to be found. If we remember the considerable number of jurors who were required each year for the civil assizes, the grand juries of the itinerant justices and justices of the peace, the petty juries of the same courts, the sheriff's tourn and the courts leet, there will be seen to be an annual participation of thousands, by which knights, freeholders, and burgesses remain in a state of active independent co-operation. In 1 Richard III. c. 4 it was certainly provided that in the sheriff's tourn, in addition to freeholders of twenty shillings, *villani* also of 26*s.* 8*d.* should be required to do suit, a provision which is once again incidentally mentioned in 19 Henry VIII. c. 13. But the extraordinary service in the police courts in the country had never been regarded as an ordinary suit of court, and was the less suitable as the limitation of a pecuniary qualification, since in the private leets the copyholders were only required to do suit in cases of emergency, and then without uniformity or any legally recognizable principle. The somewhat undefined conditions of the old duty to ordinary suit of court, in the county court, and of the old service in police courts, as well as those of the newly instituted system of serving on juries, made themselves particularly felt in the undecided dispute as to who had to contribute to the daily allowance of the knights of the shire. Neither the legislature nor the central courts were able to establish here any general principle. Except in the county of Kent this liability to contribute remained dependent upon local custom.

exercise the liberties of citizens." Thus only day-labourers, lodgers, guests, and strangers were excluded. By the conversion of the indefinite dues payable to the lord paramount into fixed money contributions, the municipal tenure had been placed as *burgage tenure* upon an equality with the rural free tenure, *socage tenure*. Whether householders, by reason of the mere relation of tenancy, paid scot and bore lot and were admitted to the rights of citizenship, varied probably according to custom. The titles to the municipal citizenship by birth, trade, marriage, etc., which were so multifariously discussed in later times, were originally only the normal modes of founding a household. But the form of the civic service of court, and the civic taxes, the varied landed interests of the agricultural burgesses, trade and commerce, combine to give to the municipal suffrage an unequal development with a slow yet continuous downward tendency. The contrast to the normal creation of the estates manifested itself in the English cities in the following phenomena.

1. In the decay of the discharge of suit of court in person, as a consequence of the altered judicial constitution and the gradual decline of the old police courts. From the very nature of the police business, it could be more efficiently performed by justices of the peace and constables than by periodical assemblies of citizens. The new service as juror, in which the passing of sentence was no longer involved, appeared more than ever a pre-eminently personal burden, and was considered desirable by no one. Poor laws were not as yet a part of the administrative system of the community. The periodical meetings of the citizens (courts leet) thus lost their practically important business, and only retained any degree of importance under special local conditions. For the service on juries the stat. 21 Edward I. allowed "custom" to decide, without fixing any qualification for the municipal juries. But poorer persons as well as various wealthier tradesmen and the civic notables soon sought to avoid the service. For current administrative matters there were formed almost everywhere administrative committees, who

were either constituted out of the "leet juries," or were, as occasion required, newly formed from among the number of chosen councillors. But such committees as are employed upon single lines of business, particularly the assessment of taxes, have notoriously a tendency to become permanent and finally to fill up their number by co-optation, as no one usually presses for participation in them.

2. The original character of the municipal assemblies and money grants became also altered. For the deliberation in Parliament as to subsidies proposed to be voted, the municipal deputies were at first only regarded as a representative committee of the *communitas*, which received binding instructions from its constituents; and originally perhaps in municipal assemblies a serious deliberation may have taken place as to the amount which it was proposed to vote. However, an understanding had always finally to be arrived at among those summoned to Parliament, by which the determination of these money grants became centred in the body of the representatives. But the more the recurring money grants adopted a uniform character, and particularly after the rates of contribution for the individual localities had become fixed, the more did such deliberations on taxation lose their object. The urgency of the taxes demanded by the King had finally to be left to the consideration of the deputies in Parliament. The commission of the delegates thus gradually and imperceptibly merges into a general mandate of confidence. In like manner in the apportionment of the subsidies and tenths that were voted within the district of the individual town, the scale was a fixed one, in which the principal labour fell upon the assessment commission. It is evident how thus the municipal meetings from the point of view of taxation lost their definite object. The contributions to be raised for the municipal needs of the borough were as yet too unimportant to make municipal meetings or the election of the representatives a necessity.

3. To this must be added the varieties of the municipal modes of property, when compared with the more uniform

interests of the country. Trade and commerce have a natural tendency to form themselves into guilds, and, when the guild has been established, to exclude all outsiders from pursuing the craft. Owing to the impotence of the executive (in Germany) or to *laisser aller* (in England), groups of interests arise from this which aim at the exercise of police power and, when they have gained it, at constituting to themselves an autonomous industrial or commercial law according to their class interests. This process of formation now began its work in England, yet it varied in different places according to various influences. Where the institution of guilds had attained a paramount influence, the heads of the guilds might be the select class of the active citizens. In small localities the agricultural citizens and the owners of houses formed themselves into a kind of peerage, in analogy to the villages, in which the municipal landowners (burgage tenants) appear as the governing body. Where, besides the municipal mayor, no permanent council or committee existed, a gathering of all taxpayers or landowners, or even of all residents, for the performance of single acts of election was sometimes called. But in proportion as personal activity in the community decreases, different modes of property assert themselves. No statutory and no customary law can under such circumstances keep political right alive; and least of all a mere right of suffrage. At this time no abuses are as yet thought of. It was not until the following period that a conscious endeavour showed itself to fix these actual conditions by incorporation, and to replace the local unions by a counterfeited notion of "corporate" unions. But how small the actual electoral body was, is shown by the fact that even from the time of Edward III. the beginnings of a system of bribery are met with. (3[a]) The legislature allows these conditions to continue in their diversity, and even aggravates them—

(3[a]) The political economic diversities, from the point of view of social economy of the landed, industrial, and commercial interests of the English towns towards the close of the Middle Ages have been treated by Stubbs, iii. pp. 359-392 ("Municipal History"). The English industrial and commercial policy of this period has been very thoroughly treated in German treatises,

4. By an aimless increase in the number of parliamentary boroughs. Their modest position appears to have kept alive the opinion that in them there was to be found a parliamentary element devoted to the royal power. In spite of the resistance of the towns themselves, the number of members was at the close of the Middle Ages increased to four times

particularly (with a full use of records) by Georg Schanz ("Engl. Handels Politik gegen Ende des Mittelalters," Leipzig, 1881), and in practical conciseness by W. von Oschenski ("England's Wirthschaftliche Entwickelung im Ausgang des Mittelalters," Jena, 1879). For the village institutions I refer my readers to the important contribution of Nasse ("Die Mittelalterliche Feldgemeinschaft," Bonn, 1869). The economic interests were here so different, that in its municipal development, England most nearly corresponds to the social development of Germany, in so far as the executive, generally maintaining a passive attitude, allows the social groups to form their own constitution autonomously. The Cinque Ports retained an exceptional position between the knighthood and citizenship, on account of their special duty to defend the country. The great trading and commercial towns allow the trading companies and commercial guilds a definite share in the municipal government, which also extends to numerous inland towns. Trade and internal commerce show no very strong inclination for corporate exclusiveness, but certainly for the export trade, which a few towns had originally, by reason of the dues imposed upon export, contrived to secure to themselves by the so-called "staple privileges." The articles of export thus monopolized were wool, sheep skins, leather, lead and tin, which only the merchants of the staple, as a corporation with exclusive jurisdiction, were allowed to export. The staple places were London, Bristol, Canterbury, Chichester, Exeter, Lincoln, Newcastle-on-Tyne, Norwich, York, and Caermarthen. Such privileges have not formed the municipal constitution; but they have in some places aided in breaking through the normal municipal constitution by a kind of guild system. The periodical mistakes of this economic policy are seen in the decay and impoverishment of the small inland towns by the monopoly of the staple places, which is also manifest in the tax-register as well as in a certain indefiniteness of the legislation concerning these staple articles. All these elements are seen accumulated in London on the largest scale. In general, there prevails, it is true, at the time of the origin of the estates, a good understanding between the great landed interests of the country and city, in which from the earliest times the most powerful part of the nobility for a certain portion of each year resided in person. But just in this place a fluctuating struggle is seen in the creation of social class-right. The industrial property lies here so thickly accumulated that the uniform wealthy corporation aimed at overcoming its neighbour—that is, the guild system endeavoured to suppress the municipal system. After an unsuccessful attempt under Henry III. (1362), the municipal suffrage was granted to the guilds by ordinance under Edward III. The municipal elections now actually passed from the burgesses to the trading companies. The innovation was, however, so opposed to the bases of the municipal and county constitution, that shortly afterwards an ordinance, 7 Richard II., restored the old order of things and reinstated the wardmote in its old rights. But the battle between the guilds and the municipal government continued without interruption from that time forth; the guilds retain a continual influence upon the elections, and gain also from time to time new royal concessions, as under Edward IV. A list of the older charters of London is to be found in Merewether (iii. pp. 2360–65). *Cf.* Gneist, "Die City von London," 1868.

the number of the knights of the shire, whilst the corresponding ratio of performances in the service of the State was rather the reverse. This undue ascendency is now seen in the social tendencies of the legislature. As early as Edward I. the citizens of London petition that the foreign merchants be driven out of the city "because they become rich to the impoverishment of the citizens." The influence of the boroughs compels Edward III. to restore the staple privileges which had been abolished. Special laws are to protect the "honest merchants against increase of prices." The admission and toleration of foreign handcraftsmen meets with repeated opposition. The exportation and importation of wares is to be effected by ships which belong to the King's subjects (Rich. II.). Only persons of an income of twenty shillings may allow their children to learn municipal trade or commerce (7 Hen. IV. c. 17). Still more important is the system of police regulations affecting labour. The plague in the year 1384, and the consequent increase in wages, at first caused an ordinance to be issued and two years later the frequently mentioned parliamentary statute, which fixed the wages at the scale of the last five or six years, under threats of imprisonment and branding. Under Richard II. new statutes are passed, which prohibit a number of amusements to the lower classes, and are intended to keep them closer to their homes. The insurrection of the peasants under Richard II. leads to the misapplication of the penal laws touching high treason. Under Henry VI. the union of labourers for the purpose of evading the statutes of labourers is declared felony. The Lower House once even petitions that the lower classes be prohibited from sending their children to school and devoting them to the clerical profession—and that too "for the honour of all free men in the kingdom." In the sumptuary laws the prevailing idea is that of "keeping the money in the country." It was only owing to the higher power and clear-sightedness of the monarchy, the magnates, and the knights, that these attempts were defeated, and their encroachment in general neutralized.

In the varied aspect of these phenomena it is clear that the firm cohesion which unites the knights and freeholders into one single *communitas* in respect of service and taxation, and knits them together with the estate of the nobility, is wanting in the municipal elements. The civic members only represented a part of the boroughs, which were originally selected at random, and distributed very unequally among the counties. The greater number of them represented no more than a market and trading centre for the surrounding country. The really active element among the citizens was very unevenly distributed in the several towns, and displayed a constant tendency to still further diminution. The natural result was, that in the municipal representation only a taste and understanding for local and class interests could develop, and no higher political taste for the "*ardua negotia regni.*" (3[b])

In the inner life of the cities there is certainly seen much stirring agitation, sometimes even a violent struggle, not indeed between "capital and labour," but between trade and commerce, between trade and trade, guild and guild, magistrates and guilds, or magistrates and citizens. Into the dynastic party struggles of the times and into the feuds waged between political factions in respect of the relation of the royal council to Parliament, they were drawn only through the party leanings of the nobility and the knights. But down to the close of the Middle Ages scarcely a single instance can be discovered, where, in the political party struggles, an in-

(3[b]) In harmony with my views, Stubbs remarks: "The presence of the borough members is only traceable by the measures of local interest . . . local acts for improvement of the towns . . . diminution of imposts in consideration of the repair of walls, and the redress of minor grievances." The merchants "thought it more profitable . . . to negotiate in private . . . with the King, than to support his claims for increased grants of money in Parliament; out of Parliament they were his pliant instruments; in Parliament they were silent or acquiescent in the complaints of the knights." "There is scarcely the vestige of an attempt to reform the borough representation" (Stubbs, iii. 589). At the head of the political movements in the Lower House are to be found only the knights. The boroughs merely give notice of local disorders. The great commerce stands as a rule on the side of the royal authority. Sometimes certainly among the knighthood the interest of the landowner is paramount regarding the rights of the workman or day labourer, but on the whole a continuity of their policy is seen in constitutional traditions (Stubbs, ii. 514).

dependent proposal has proceeded from the burgesses. In the struggle also between the dynastic parties they were canvassed by both sides, but yet play no important part in the struggle, and do not display a constant devotion either to the Red or to the White Rose.

Thus was all precedent and all principle wanting for the laying down of the passive qualifications of eligibility for the office of municipal representative in Parlianent. The writs addressed to the sheriffs are worded as before, as indefinitely as possible—an election to be made "*de discretioribus et magis sufficientibus;*" and thus it remained. But who should these eminent representatives be? The actual state of the judicial, magisterial and fiscal relations rendered the inactive mass of the citizens, as a rule, indifferent to an isolated electoral act; as a matter of fact the electoral body was, in the majority of the boroughs, a small and select one. The choice fell, naturally, upon notables and civic gentlemen of the commissions of the peace. But as the commission of peace of the county was regularly connected with the cities, through the medium of the current police administration, the "gentry" came also into permanent connection with the boroughs, which in the fifteenth century often made them the objects of their choice. In any case, those appointed to the commissions of the peace and as deputies, represented analogous elements of property, to whom the gentry could not refuse an equality of standing with themselves. Towards the close of the period we find consequently the titles of the gentry, such as esquires, etc., conceded also to certain municipal notables.

But the more important political business was discharged by the staff of justices of the peace and by the deputies in Parliament, by which means an impulse to work for the public good and a permanent political influence were thus given only to the higher classes. In the case of the higher ranks of the borough population, the foundation was thus laid for their later fusion with the class of knights, forming a united gentry. In another direction, by the lowering of the inferior

civic classes to the level of inaction, the foundation of the pre-eminently aristocratic character of the later parliamentary representation was laid. For the landowning classes of the county, as a whole, the fabric of the three-estate-system, based as it was upon independent activity and rateability, was so immovably and firmly established, that it was capable of embracing and supporting the motley and anomalous forms of municipal representation, and thus in marvellous continuity outlasted the storms of the Reformation and the Revolution down to the nineteenth century.

IV. What remains infra classem after the three estates had been separated off, is in the main a working population, which enjoys indeed personal liberty, but without any share in the political rights of the parliamentary constitution. These classes of society also pay their dues; but in the great majority of cases not to the State, but to a landlord, a master, or householder, who is the immediate bearer of the State burdens. Some of these classes could, as supplementaries, discharge the suit of court in the court leet; but this form of magisterial courts was only a local, incidental, varying and now decaying institution.

The improvement in the position of these classes, which had now taken place on the whole, is pre-eminently due to changes in rural economy. The money system with its liberating effects had now passed from political to local, and from public to private economy. Landowners and monasterial corporations at this period farmed no longer by means of bailiffs; a new system, that of rent, had come into being, and a new class of leaseholders had been formed, occupying a middle position between the freeholder and the agricultural labourer. After their numbers and their prosperity had both increased, they share, with the small freeholder, the name of "yeomen." Such leaseholders in the fifteenth century, in ever-increasing numbers, took the place of the local bailiffs who formerly managed the lands of the lords and the monasteries, but they stood in another form of dependence upon the landlord than did their predecessors. In respect of taxation,

they were rated *in bonis* almost in the same way as the freeholders *in terris* (Stubbs, iii. 552, 553). Their position, moreover, is dependent upon the amount of the rental and the capital. But with the leasehold system the interest of the landlord disappears in the services of his villeins, whose emancipation in consideration of money payments had been extensively brought about.

Epidemics, bad harvests, and mistakes in the policy of taxation had, under Richard II. and Henry VI., caused repeated insurrections of the peasants, which were apparently attributable to the attempts of the landlords to re-introduce villeinage and manorial services, after new relations of service and rent had already taken their place. But when the system of money payments had become once for all established, by means of the institutions of rent and wages, the reasons for dissatisfaction were quietly removed, both by the landowners themselves, and by the abandonment of the unsuccessful system of poll-tax.

This new system of economy shows its favourable results first of all in the abolition of serfdom. Whereas it was formerly more the influence of the Church, it was now the economic interest of the lord himself, which favoured the emancipation of the remaining bondsmen, for a free labourer proved a more capable man. Jurisprudence also accorded to the bondsmen the personal protection that belonged to the *liberi homines*, by regarding their relations to their lord as a legally defined exception. The serfs who still exist at the close of the Middle Ages are quite unimportant anomalies. (4)

Quite as much ameliorated was the legal position of the

(4) In the insurrection of the peasants under Richard II., the social ideas of the labouring classes went hand in hand with the heretical efforts against the Church. From the standpoint of human rights, the emancipation of the bondsmen was placed in the foreground. The act of emancipation, which was passed at that time, was certainly repealed at the instance of Parliament; the interest of the lords themselves was, however, apparently sufficient to remove this grievance, which in later times was never revived. In the rebellion of John Cade (1450) the agitation was neither on account of serfs nor of reformation ideas, but it was only the classes, who laboured for hire, who demanded the "seven halfpenny loaves for a penny," abolition of money, equality in dress, etc., *égalité et fraternité*, the natural antipodes of an exaggerated system of regulations affecting labour, which again disappears with the excesses of these regulations under the houses of York and Tudor.

manorial peasants or *villani*. The undefined services attached to these villeins' estates became, in process of time, for the most part converted into money rents, for reasons which lay in the economic interest of leasehold (Scriven on Copyhold, i. 46, 428). In the case of a higher class of them, at the commencement of this period, a right was in practice accorded to their land, to the extent, that deprivation might only take place according to the custom of the court (the later so-called privileged villeinage). For the rest, likewise, a right of deprivation only *ex justa causa* was recognized towards the close of the period by a famous decision, Taltarum's case, under Edward IV. "Copyhold" became, in this later period, more and more the common term, a name derived from the court roll, which was the title of possession. (4ª)

The labouring classes of the cities were also in economic dependence upon property, but only in the free relation of the contract of hire. The narrow-minded restriction imposed upon their liberty of movement by the poor-law regulations was not introduced until later centuries. They share their passive position in the municipal government with the majority of the wealthy classes themselves in the later form of the municipal suffrage.

What the parliamentary constitution was able to concede to the unrepresented members of society (who in every form of representative government form the majority), was the legal liberty of mounting up into the higher classes, in which respect this constitution, in comparison with the parliamentary con-

(4ª) The copyhold was once estimated by Lord Coke in a decision at one-third of the whole real property in the country, an estimate which, according to later statistics, was perhaps twice its real extent. Of a separate nature were the tenures in ancient demesne. These comprised partly full freeholders, partly hereditary *villani* (analogous to the privileged villeinage), partly mere copyholders, who were by royal favour exempted from the ordinary courts and the county government, freed from jury service, and therefore, also unrepresented in the county and in Parliament, not bound by parliamentary money grants, and only subject to their special *tallagia*. Representatives of them were often summoned to Parliament, but they never met together with the Commons and formed no part of the Parliament. In the case of these peasants the taxing right of the Crown continued longest. In the later voting of the taxes the King consents on his side for those peasants unrepresented in Parliament in the words "*Le roi aussi le veut.*"

stitutions of the Continent, is a model one. As it is open to the labourer in town and country by industry and skill to rise to be a tenant and small proprietor, so also is the way open to the working classes to enter into a more profitable career by their freedom of movement from place to place, and by the freedom of entrance into local companies and guilds; to the middle classes in the towns is open the entrance into the offices of the municipal government; whilst the notables of the towns can obtain admission into the commissions of the peace or parliamentary representations, even with the honorary rank of esquire. The retail trader can at any time become a freeholder, and the leaseholder, in addition to his leasehold, can also exercise political rights as a freeholder. The wholesale trader can acquire from the impoverished noble the ancestral estate with all the rights and privileges of a manor attached; and his family in the second generation will be reckoned among the most zealous champions of the privileges of the knighthood. Conversely the entrance of the younger sons of the nobility and the knighthood into the counting house of the merchant was not considered derogatory to their rank. The names of knights of the shire are found on the registers of the trading companies and guilds, and members of the old nobility solicited with especial eagerness the offices of the civic mayors, aldermen, and recorders, as well as the municipal seats in Parliament. Elevation into the higher estates by means of the Church is open to all classes; the middle classes may attain high honours and dignities through the law Inns of Court, and for the highest merits in that profession, even admission to the ranks of the peerage. (4[b])

(4[b]) "The younger sons of the country knight sought wife, occupation, and estate in the towns. The leading men in the towns, such as the De la Poles, formed an urban aristocracy that had not to wait more than one generation for ample recognition. The practice of knighthood . . . the custom of wearing coat-armour, as well as real relationship and affinity, united the superior classes; the small freeholder and the small tradesman met on analogous terms" (Stubbs, ii. 188).

What an alleviating influence the early organized direct system of taxation naturally exercised upon the class interests is shown by the tax assessments themselves. The sumptuary laws (23 Edw. IV.), the equality of the property and family law, and

The firm bond which knits together the system of this social formation by means of self-government and payment of taxes with the highest functions of the executive, extends down to the lowest classes as a bond of social aims, which placed, indeed, actual impediments in the way of ability and merit, but never legal barriers. English society thus attained a fundamental basis for the development of individual ability and energy, which determine the course of its history during the following generations.

equality of taxation, produce here groups of society such as were unheard of on the Continent. The property tax of 1359 shows, for example, the following groups:—Dukes (133 shillings), justices of the Crown (100 shillings), earls and the mayor of London (80 shillings), barons, bannerets, Crown counsel and great advocates, aldermen of London, mayors of the large towns (40 shillings), knights, lawyers, councillors of the second order (20 shillings), knights of orders and merchants (13⅓ shillings), esquires, lower lawyers, mayors and councillors of small towns, greater freeholders and greater tenants (6⅔ shillings), lower monks, esquires, and gentlemen without landed property, smaller merchants, tradesmen and tenants (3⅓ shillings), and so on. That in the offices of the royal court the three great classes of serjeants, gentlemen, and yeomen were distinguished, and that the social classes were regarded otherwise in the herald's office, was, at the close of the Middle Ages, just as natural as in our time.

CHAPTER XXIX.

The Organization of the State—The Royal Prerogative.

Like the permanent division of society into classes, there was also completed in this period an organization of the executive, which, though obscured by dynastic struggles, became accomplished in a quiet continuous development.

Marvellous to relate, yet vouched for by contemporary writers, the itinerant justices and jurors went their regular circuits all through the aristocratic Wars of the Roses. In fact, by the legislation of this period, those permanent institutions were founded, which towered above the struggles of the time like a pillar;—large independent local unions, and great judicial corporations, encircle every government redoubtably, even in the conflict for the crown itself. But the position also of the permanent council, which from its central place exercises in daily action the varying functions of the executive, had become changed by the regular commands and prohibitions addressed to functionaries or to subjects being permanently regulated; and that, too, in a double manner, either (1) by ordinances, issued without the consent of Parliament, and which are alterable at the will of the King alone; or (2) by statutes, which were issued with the consent of Parliament, and were binding also upon the King, and could not be altered without the consent of the three estates in Parliament.

The powers of the monarchy (state) still continue in the form of administrative regulations and ordinances, uncur-

tailed, nay, materially extended by new demands made upon the subjects; but the exercise of them is, in harmony with the nature of the State, with wise moderation confined by the Crown by unalterable rules. The King accordingly no longer appears as the personally commanding ruler, the feudal, military, judicial, and magisterial lord; but the Crown appears as a permanent institution, which guarantees legal protection and permanent support to the life of society, and thus takes firmer root in the heart of the people. With this self-restriction by law, there accrues also to the King himself a firmer legal protection, and to his rights an enhanced inviolability and sanctity.

This specialization of the administrative law, which forms the transition to the modern political system, appears in the fourteenth and fifteenth centuries to have advanced in all departments of the political government, although in different degrees, according to the temporary needs of the executive power.

The military power over the Crown vassals continues according to deeds of enfeoffment and custom (common law); but the system of the national militia had become more comprehensive and more living; the recruiting and employment of which was now fixed by parliamentary statutes. But the deficient principles of the recruiting leave room for various abuses of the military power for financial and political purposes.

The judicial power is based partly upon Norman administrative practice, but in its most important features upon statutes, which more exactly define the position of judge and jury. The weak point is the reserved *jurisdictio extraordinaria*, which still follows the lax principles of the old administrative system, often restricted, it is true, by Parliament, yet just as frequently extended by party leanings.

The magisterial power is based partly upon common law; but, in its principal departments, upon an endless series of statutes affecting the public safety, trade, and labour; all which in some measure limit the arbitrary powers of the local

magistrates. The weak place here is the extraordinary powers residing in the royal council.

The financial power is based upon the demesne-possessions, the feudal dues and other hereditary revenues of the monarchy, whose extension was effectually prevented by statutes. These form the "ordinary revenue," out of which the current expenses of the State are to be defrayed, supplemented by extraordinary and periodically granted land and income taxes, to the grant of which the estates begin to attach conditions.

The ecclesiastical power of the King had been much restricted after the events of Magna Charta; in the dualism of the ecclesiastical and temporal state it was only the external boundary-quarrels that were settled by statutes. Encroachments of the Church upon individuals were stopped by "writs of prohibition," encroachments upon the State by penal prosecutions under the new statutes.

The organs for the exercise of the rights of the political sovereignty thus organized have been already described, but shall be again recapitulated in this place in their three principal limbs.

1. *The Central Courts* connected with the county and local courts form the *jurisdictio ordinaria*, the permanent part of the judicial system. There still continues a personal dependence of the justices of the realm, who remain at the same time assistant *justitiarii* of the council, and whose appointments are as a rule subject to revocation; the spirit of monarchical government, however, makes this deficiency less sensibly felt. As early as by the stat. 2 Edward III. c. 8, the justices were ordered to allow justice its uninterrupted course, without regarding orders issued under the great or privy seal; the stat. 11 Richard II. c. 10 adds to this, that no writing is to be issued under the signet or privy seal to the disturbance of the ordinary course of justice.

2. *The Continual Council* is the central department for the exercise of the sovereign and political rights in all directions—with reservation of the fixed spheres of the *jurisdictio ordinaria* and the ecclesiastical constitution. Here is the active seat

of the royal political government, the legality of the proceedings of which is enforced by the bringing forward of national grievances in Parliament, or, in an extreme case, by an impeachment of ministers. By practice and statutes the personal responsibility of the principal officials has already been expressly recognized.

3. *The Magnum Concilium* in Parliament, finally, forms a supreme council of the Crown, periodically summoned, which includes the prelates and barons, and, in its widest extent, the representatives of the Commons also. The participation of each portion in the functions of a council of the realm has been laid down by parliamentary practice, and in such a manner that the participation in the highest extraordinary jurisdiction remains restricted to the Upper House.

In its intermediate position between the courts of justice and the Parliament, the Continual Council has been gradually coerced into a legal line of government. But the bitter conflicts of the age again and again proved that for the attainment of this end neither judicial officialism nor parliamentary meetings were in themselves sufficient, but that there was rather needed a ramification of the rights of political government into the district and local institutions, to form a counterpoise to the violence of the parties. All legal barriers imposed upon despotism have only become gradually effectual by the system of self-government, in which the wealthy classes assume the exercise of the political functions, and thus undertake the protection of the individual against abuses of the political power. Of this the Middle Ages always retained a lively sense, which the feudal system and the feudal courts on the one side, and the traditional Saxon judicial institutions on the other, had engrafted upon the nation. By the blending of the nationalities both tendencies became fused together. Having advanced in person to the supreme government of the realm, the county and municipal unions comprehend in themselves both feudal and local law, military and municipal constitutions, ruling classes (prelates and nobles), and middle classes (knights and burgesses), all in a living organization.

It was out of this combination, individually and collectively, that the personal and political liberty of the nation proceeded. Counties and townships have become independent in consequence of their connection with the judicial system; the courts have become independent through their connection with the independent committees of the county and civic unions (juries). By its representation in Parliament the collective community system has become a permanent counterpoise to absolute political government. The peculiar nature of the English constitution has now become fixed by the formation of communal bodies for the service of the State. They are individually described as "counties," "ridings," "hundreds," or collectively as *communæ, communitates;* only in the cities has the first formation of "corporations" commenced, which in later times became the source of artificial deformities. As personal service and rateability in respect of taxes, were by principle combined together in the communal bases, so was it also the case in Parliament—only that in the case of the prelates and lords it was their personal participation in the affairs of Government, in the case of the *communæ* their rateability, which appears to be the predominant feature.

In accordance with the nature of the State there thus arises a relation of mutuality with respect to public rights. The liberties of Parliament are originally an emanation of the royal power. There exists no parliamentary right of bishops, lords, knights, and burgesses, which was not in its origin a result of royal grant. The maxim of the courts of that period, "*Tout fuit in luy, et vient de lui al commencement*" (Year-book, 24 Edw. III.), was fundamentally true. The development of the parliamentary constitution from a system of personal government was also discernible in the fact that the kings themselves, whilst mere children, were obliged to perform in person certain acts of sovereignty.

On the other hand, the title to the crown in this period had been more than once created by Parliament, and still more frequently were the rights of the Crown defended and maintained by Parliament. Under the house of Lancaster, at all

events, the Crown was no longer based upon the ground of hereditary descent alone, but upon mutual acknowledgment. Hence the maxim of the courts: "*La ley est la plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera*" (Year-book, 19 Hen. VI.).

The fixed elements of the political system of this period are to be found in the judicial system, in the systematic combination of the exercise of the sovereign rights with property, *i.e.* self-government, and in the perfectly stable ecclesiastical constitution. They are all represented in the Upper House as being the head of all judicial constitution and government, including the highest *jurisdictio extraordinaria*. The special rights of this high body are indeed described as "privileges;" but these privileges are political rights with an upward tendency, and are not (as in the *ancien régime* of the Continent) social advantages with a downward tendency. They afford to a supreme legislative council the necessary personal independence in dealing with the Crown and its paid servants; but involve no inequality in respect of family and property-law, no immunity from taxation, and no exemptions prejudicial to other classes of the people. The conservative portion of the constitution has already, at the close of the Middle Ages, become well fitted to guarantee the maintenance of the constitution and the conduct of the affairs of the realm according to the laws of land.

The moveable part of the political government has, besides this, an extensive province. Within the circle which law-courts, the Upper House, and the Church describe around the personal government, there is a wide domain, in which the "King in council" moves, and at his side the Commons, with their grievances and motions, with their initiative in legislation, and conditions annexed to taxation. The fixed sphere of political government becomes more extended in each generation; but in like manner also the moveable circles become expanded, owing to the continual fresh needs of the State and society. In the Middle Ages a narrow-mindedness is

visible, which on the one hand would wish to pass all sovereign power through the mould of an established legal organization, while on the other hand, for the sake of immediately satisfying social demands, it would fain ride roughshod over every legal barrier. Both tendencies are represented in this constitution; the restless element pre-eminently in the House of Commons, with its preponderance of small burgesses. The instability of all representation of interests is here quite as visible in numerous small features as the party spirit of the magnates is seen in greater. The instability of such efforts and aspirations, combined with the violence of the Middle Ages, then points ever to the King, as being the embodiment of the perpetual impartial sovereign power. Every collision of the estates with each other and with royalty, awakes afresh the consciousness that the source of all the rights of the great lords, and the last protection and support of the weaker classes lies only in the permanent sovereign power —that is, in the monarchy. At every encroachment of the Lords and their great parties, the jealousy of the Commons is aroused, and an altered tone is noticeable both in the lower ranks of society and in the Church. Often as the Commons, in those party struggles, follow the lead of the Lords, in the moment of necessity a king who is conscious of his vocation finds still in them his greatest support, and the grateful recollection that it is to the monarchy that they owe their liberties. A rising of the unrepresented classes against the monarchy never occurs throughout the whole of the English Middle Ages.

The constitution of Parliament has accordingly, in contrast to the Norman period, led to an exaltation and an enhancement of the royal dignity in spite of all the fluctuations and violence of this period. "There is," says Hallam, "nothing, absolutely nothing of a republican aspect. Everything appears to grow out of the monarchy, and redounds to the advantage and honour of the King. The voice of the petitioners is, even when the Lower House is in its most defiant humour, always respectful; the prerogative of the Crown is always acknowledged in broad and pompous expressions" (Hallam, iii. 153).

The people's conceptions of law were determined, as had ever been the case, by the customary legal relations, with a strong influence of recent impressions. The popular ideas of the royal power (*) at the close of the Middle Ages could not therefore be simple ones. In the conceptions of those times State and society combine to form a threefold basis of royal power.

An old historical basis still existed in the idea of the suzerain ownership of the King in the soil, as *Dominus Angliæ.* The King was in fact still the greatest landowner in the country, as he was in theory the sole landowner. With the gradual dissolution of the feudal law in favour of private property, this conception becomes less prominent; it was shaken also by the change of dynasties. The recognition of this principle was, however, for the wealthy classes a necessity, because by legal construction it had become the source of all private rights in the soil. The English monarchy had thus attained a solid foundation of hereditability, such as the German empire could not claim. The doctrine of the jurists treats the succession to the throne according to the right of primogeniture in the same way as the succession to real property, from which also the expression "title" was borrowed. Like the succession in real estate, it follows immediately, and is *ipso jure* attached to, the title of possession residing in the predecessor. After Edward I.'s accession no interregnum was legally recognized in a succession to the throne (Allen, "Prerogative," 47).

The monarch represents, moreover, "the head of society," and as such is recognized by the forms and ceremonies of the court, which in the coronation festivities even reproduce the household of long bygone centuries. The old hereditary court offices of High Steward, Great Chamberlain, High Constable, and Earl Marshal still continue. Of the heads of the active court officials, viz. the King's Chamberlain and the Steward of the Household, the first has now become an active minister of State, and the second the managing head of the household.

(*) Cf. *infra*, the note at the end of this chapter.

The splendour of the temporal as well as of the spiritual side of the Court was enhanced by the constitution of Parliament, not as a mere idle show, but in involuntary recognition of the necessity of raising the monarchy above the rich and brilliant nobility of this period, and thus to hold up the sovereign power in the public view above all the classes of society.(**)

(**) The courts of the Plantagenets, like the courts of all times, suggest reminiscences of an older social order of things. This is especially the case with the coronation ceremony, in which the old household of the head of a German clan is again revived, from the great honorary offices down to the smallest services. The office of the hereditary *major domus*, Lord High Steward, as the first court official, died out in comparatively early times, but was revived for coronation festivals and for a solemn peers' court, *pro hac vice*. The hereditary office of Lord Great Chamberlain continues even to the present day as an hereditary office, fulfilling the chief honours on the day of coronation. The office of the Lord High Constable, with his seat in the *curia militaris*, and his patronage of lower offices at court, in the army, and in courts of justice, continues during the Plantagenet times. The office of Earl Marshal, after many escheatings to the Crown and re-grants, is at times hereditary, at times held for life, and then again a revocable honour. It was otherwise with the active court officials, who even in the preceding period formed a second class separate from the hereditary offices. A long list of this royal household under Edward IV. is given in the *Liber niger Regis Angliæ*, printed with other documents by the Antiquarian Society (1790). The real administrative court functionary is, as in our day, the Steward of the Household. The remaining officers of the household (some of whom were also state officials) are the bishop confessor, the Chancellor of England, the Lord Chief Justice of the Common Pleas, the King's Chamberlain, bannerets, knights, secretaries, chaplains, equerries, keeper of the wardrobe, gentlemen ushers, yeomen of the Crown, grooms of the chamber, pages of the chamber, officers of the jewel-house, the physician, surgeon, apothecary, and barber of the King, the henchman, squires of the household, king-at-arms, heralds, serjeants-at-arms, minstrels, attendants and messengers; the dean of the chapel, chaplains and clerks, yeomen and children of the chapel, clerk of the closet, master of grammar, officer of vestiary, clerk of the Crown, clerk of the market, and clerk of the works. Besides these a secretarial staff of clerks of the board of green cloth, clerks of the control office and counting-house. Under departments: The bake-house, the larder, the pastry-kitchen, the cellar, the vintner, the beer-cellar, the tankard-house and bowl-house, beer-bearers, the spiary, the confectionary, the light department, the butler's department, the linen department, and the laundry department. How necessary such a complicated household was according to the notions of those days is shown us by the analogous household of the royal family and the magnates. The Black Book fixes the *état* of the Queen at forty shillings a day, in addition to twelvepence each for one hundred retainers (£2555 annually); for the heir to the throne thirty shillings, as well as a suite of fifty (£1560); for a duke and suite of two hundred and forty (£4000), etc. As a classification in almost all branches of the household, the division into serjeants, gentlemen and yeomen is revived, which was at the same time an expression of the social ideas of rank in those times. A royal body-guard of twenty-four serjeants-at-arms had already been formed by Richard I., which was employed as an active guard of honour for the Parliament, the Chancellor, and the Treasurer.

The Crown, as hereditary possessor and source of all magisterial power, forms in the legal and religious conceptions of the time the nucleus, compared with which all possessory and social conditions appertaining to the monarchy are only means to an end. As the conceptions become matured, new expressions for it come also into use. As the name "parliament" appears with the new conceptions of social right, so as its correlative the term "royal prerogatives" occurs. At first it meant especially the financial rights of the King, arising from his feudal suzerainty, all which should be as against the estates a *noli me tangere;* as in the *statutum de prerogativa Regis,* under Edward I. (formerly generally attributed to Edw. II.). In later times the judicial power appears as the centre of the prerogative, which appertains to the King of his own right independently of the ruling classes. But the more extended the tasks of the sovereign power become, the wider and more comprehensive becomes the notion of the prerogative, until it reaches the conceptions advanced by Coke and Blackstone. It is the same notion which the later German imperial law associated with the term "*Kaiserliche reservatrechte,*" yet with the material difference, that these *reservatrechte* of the English monarchy embrace an extensive and actual *imperium,* and that the English parliaments have not, like the German imperial and provincial representative assemblies, forced their way into an habitual exercise of the sovereign and administrative power in all those functions which, in a well-organized political system, can only be securely centred in a single hand. In England also, as is always the case, many conceptions of later days have erroneously been attributed to the Middle Ages. The difference between the constitution at the close of the Middle Ages and the modern theories of constitutionalism lies principally in two points.

1. The King has the commanding and disposing power in State affairs (the *imperium,* the ruling power) which, as in the Carlovingian constitution, is the source and basis of the royal prerogative. The immediate emanation from it is the right of ordinance; for what the King can command in single

cases he can also ordain for similar ones. This right is now limited by parliamentary statutes, but not restricted to the mere "execution of laws." From this follows the right of appointing the organs of government. From all encroachments and excesses Parliament always voluntarily returned to the royal right of appointing the officers of State. Only a few offices, and those subordinate ones, are held by the feudal mode of "tenure." It is, moreover, a maxim of common law that all magisterial offices are held revocably during the King's pleasure; with the exception that the tenure of the judicial office for life had already become usual in practice. This ruling power comprises that which the later treatise of Blackstone describes as the "royal authority," that is, (1) the representation of the State towards foreign powers, decision as to war and peace and international treaties; (2) the military command over every branch of the armed force; (3) the King as the fountain of justice, with the rights of appointment which flow therefrom; (4) the King as supreme guardian of the peace; (5) the King as the source of offices of honour and privileges; (6) the King as the arbiter of commerce; and (7) the now very restricted ecclesiastical supremacy. But the difference between it and the conditions obtaining in the eighteenth century lies in this—that the numerous ambiguous points of sovereign rights, which have not as yet been determined by the legislature, make these powers appear as real rights, which are in normal times left to the personal decision of the King. As yet no party government, in the meaning of the eighteenth century, exists. The Church is as yet perfectly separated from the temporal State. As yet the real political government is united in the person of the King, his counsellors, and courts of justice. No parliamentary budget, no influence by the estates of a continual control of the incomings and outgoings of the State has yet been established. The financial centre is as yet in the King's hereditary revenue. It is to the King, and not to the Parliament, that the Treasurer presents a *status* of the revenues, an annual budget (as is mentioned for the first time, in

1421). As yet there was combined with the prerogative of the Crown the idea of an extraordinary dictatorial power residing in the King, which in any State crisis could thrust aside the self-imposed barriers, laws, and judicial constitution, and find a remedy by extraordinary measures, jurisdiction, and ordinances—an extraordinary power which was made frequent use of by the Tudors, and frequently abused by the Stuarts, and was only in later centuries further restricted and reduced to a minimum.

2. The King, and not the Parliament, has the legislative power. Law is only an ordinance strengthened by the consent of the estates, and which, not being one-sidedly capable of alteration, without the consent of the estates, represents the highest controlling force of the absolute power. The notion of a "*veto*" of the King is a modern interpolation; the English constitution knows neither the term nor the act. It is not the estates that have a legislative right with the reservation of a *veto;* but it is the King who gives the laws, subject to the co-operation of the estates: "*Que le roy fist les leis par assent dez peres et de la Commune, et non pas lez peres et la Commune*" (Year-book, 23 Edw. III.). The King is accordingly not bound to summon Parliaments at stated times. The promises made on this point (4 and 36 Edw. III.) remain intentionally ambiguous in their language, and are regarded as one-sided assurances without prejudice. The participation of the estates in the legislation is only understood in this sense, that the King shall not alone repeal what has been resolved with the co-operation of the three estates. Their consent does not, however, in principle abolish the right of the King to command and ordain. The Middle Ages regard the permanent statutes originally as agreements with certain and definite estates (*stabilimenta*); the higher idea of a law as being a supreme rule imposed by the majesty of the State upon all classes of the people has been only gradually inherited by the State from the Church.

As the Anglo-Saxon monarchy was built up upon the principles of the Carlovingian empire, so now in the con-

stitution that has been completed, the national leading ideas of State and Right enter into an organic fusion with society, in the old tripartite division (Gneist, Rechtsstaat, chap. ii.) :—

The governing power and the right of ordinance as basis;

The judicial system as barrier;

The Law as the highest controlling force of the State will.

Shifting and but slowly established by experience are the boundaries between legislation, the ordaining power, and the executive power in detail. The last named is legally restricted by the obligation of the royal servants to execute the royal laws, and by the legal duty of the monarchy to administer justice; but to draw a strict mathematical line between the legislative and executive power was proved by practice to be impossible. The English Parliaments have only become effective legislating bodies by their continual participation in government and by the habitual activity of their members in county and municipal administration. The right of the estates to concur in decreeing the laws led to a constant interference as to their application, this, in small as in great matters, being the custom of Germanic peoples. The right of Parliament to grant taxes proved itself perfectly sufficient to lend to this interference both support and effect; indeed, it appears more than sufficient for the purpose. The Parliaments of the fifteenth century, like the German Landstände, claim a voice and intervene occasionally in all matters, in war as well as peace, in diplomatic negotiations, in ecclesiastical affairs, in the internal administration of the royal household, in the appointment of the officials, in the administration of justice; no interest is too small for them and none too great, no attribute of the Crown is excluded. This encroachment, which was at times excessive, is, however, easy to explain, if the original state of the Norman administrative law be borne in mind. That system of absolutism could only be reduced to fixed administrative maxims by thousands of national grievances; and by means of continual complaints a fixed

administration was thus gradually produced by hundreds of laws and administrative ordinances, in the course of many generations. Where such an end has been attained, as regularly and uniformly as the ebb follows the flow, a reaction occurs—an ever-popular reaction and willing renunciation of acquired and apparently important rights. This thoughtful moderation is not merely the outcome of a providential peculiarity on the part of the English nation, but of a different political school of experience, through which the German Reichstände and Landstände were never so happy as to pass. These Parliaments had from the first sufficiently experienced the pernicious effects of a party government with a ruling apparatus centralized after the Norman fashion. These wealthy classes learnt, by daily exercising the magisterial functions of self-government, the necessity of a permanent organization of the administration. These Parliaments, in their constant connection with the central government, early experienced that a right of ordinance was indispensable for the sovereign power, and that an exhaustive circumscription of the sovereign power by statute was as preposterous as it was impossible. Upon the same basis the gradual definition of the parliamentary privileges by precedents arose. Moreover, the ever-recurring collisions between the legislative assemblies and executive organs are at once the weak, as they are the strong, side of all our national constitutions. A strongly defined individual sense of right shows itself in these collisions, and it is to them principally that England owes the progressive improvement in its administration. In this department, however, all government by Parliaments is experimental. The evil consequences that had arisen from the excesses of the principle of election and party rule led by experience to the adoption of the fundamental maxim, that judicial and magisterial posts may not be filled by election, but only by appointment.

Certainly these conditions were as difficult as in any modern constitutional system. Even in those times an older ruling class (prelates and barons) confronted the young electoral

assemblies of tax-payers. The aspirations of the one class to a share in the State could no more be repudiated than the rights of the other; for the State required the money, the military, judicial, and police service of the one quite as clearly as it did the military power and business experience of the other. Beyond doubt the Commons of the fourteenth century were originally as inexperienced in the real needs of a great State as the newly enfranchised voters of the nineteenth century. It became almost proverbial, that the sagacity of the commoners in discovering the grievances of the country bore no proportion to the unpracticalness which they frequently displayed in redressing them. Beyond doubt their immediate wishes, conceptions, and proposals were often incompatible with the working of the State and with the claims of the prelates and *seigneurs*. And yet the proper government of the country resided in a monarchy advised by its continual council. In spite of all encroachments of the Upper House, and sometimes also of the Commons, under every capable and under every conscientious King, the reconciliation of what was apparently incompatible was brought to pass in a harmonious alliance of rights and duties, out of which, despite all storms, parliamentary liberty emerged triumphant and the nation mighty. Parliament has always finally yielded to "political necessities," granting what was demanded by King and council. In spite of all passion and violence of factions, a spirit of patriotism and a sense of justice pervades this epoch until the crowning catastrophe of the Wars of the Roses—a spirit which is founded upon the uniform habituation of the wealthy classes to the personal exercise of their political duties. There are here the living elements of an internal harmony, in which property, political duty, and political right are balanced, in which the independent will of a free people imposes upon itself self-created laws. In the period of Edward I. and Edward III. and in the middle period of the house of Lancaster this harmony is manifested in a powerful development of the external and internal energy of the State, which causes it to be the most glorious period of

English military history. There was only needed the restoration of a certain and incontestable succession to the crown, to put this political system into such a position that it could perform new and important tasks.

NOTE TO CHAPTER XXIX.—**The legal conceptions of the royal power** are now materially different from those of the time when (in 15 John) the English barons rose with weapons in their hands to remonstrate against the treatment of the country as a general farm of the Crown, and when in 48 Henry III. they had conquered a king in open battle. The impressions of these events are expressed by Bracton (ii. 16, sec. 3) as follows:—"*Rex autem habet superiorem, Deum scilicet. Item legem, per quam factus est rex. Item curiam suam, videlicet comites, barones, qui comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine fræno, id est sine lege, debent ei frænum ponere.*"

This cavalier manner of expression may faithfully enough express the conception of the knighthood. The monkish and the popular view of the times are shown in a thoughtful political poem, "The Vision of Piers Plowman," which, in estimating the events, comes to the conclusion that if the King allows himself to be led astray and sanctions all manner of harm, or out of wilfulness sets his power above the law, the magnates have a right to save the land from such errors. The King should consult his community, to whom their own laws are certainly well known; subjects are wont to be better informed in the common law than others. But at the same time it is still necessary that the King should choose his servants, without being bound to certain men (Lappenberg-Pauli, iii. 726). The conception of a duty of the Crown to administer justice and an aversion to a purely personal rule shows itself clearly again and again. "*Ipse autem Rex non debet esse sub homine sed sub Deo et sub Lege, quia Lex facit Regem; attribuat igitur Rex Legi quod Lex attribuat ei, videlicet dominationem et potestatem; non est enim Rex ubi dominatur voluntas et non Lex*" (Bracton, iii. c. 9). In about twelve passages Bracton ever recurs to the dominion of the law and the King's duties: "*ad hoc creatus est, ut justiciam faciat,*" etc. These conceptions are primarily rooted in the conception of a reciprocity in feudal duty, as consisting of protection on the one side and fealty on the other. But they are still more deeply rooted in the Germanic popular idea of the duty of the magistrates to administer justice. As Stubbs justly remarks touching the frequently one-sided prominence given to fealty: "Fealty is the bond that ties any man to another to whom he undertakes to be faithful; . . . homage is the form that binds the vassal to the lord; . . . allegiance is the duty which each man of the nation owes to the head of the nation. . . . But although thus distinct in origin, the three obligations had come in the Middle Ages to have, as regards the King, one effect" (Stubbs, iii. 514).

Upon this broadest basis the jurisprudence of this time laid down the severest penalties of high treason for violation of the allegiance to the King, which were modified in their exaggerated severity and extent from time to time by parliamentary legislation. By the dynastic struggles men were also compelled to uphold a King *de facto* as entitled to allegiance, whereby the recognition of the monarchy as a political institution is necessarily acknowledged. In harmony with this constitutional obedience of the subjects to their legally acknowledged King, is the duty of the King to observe the laws which he has himself imposed, which was after Edward II. incorporated into the coronation oath. Parliamentary legislation now frames fixed rules for the exercise of the royal prerogative, which become a portion of the common law, and which the King can no longer repeal or alter at his own instance. The observance of these bounds is enforced by the responsibility of the

royal servants. Parliamentary practice has matured all former postulates to this one definite notion, viz. that the parliamentary government is, according to its proper nature, a political government according to law. Even Bracton opposes the Roman maxim of absolutism: "*Quod principi placet, legis habet vigorem*" by the English "*legis habet vigorem quicquid de consilio et consensu magnatum et rei publicæ communi sponsione, auctoritate regis, juste fuerit definitum.*" A chief justice of the King's Bench under Henry VI. (afterwards tutor to the heir to the throne of the house of Lancaster in banishment) expresses the same fundamental idea by contrasting a *political government* (according to law) with a *regal government* (according to personal will). Fortescue's treatise, "De laudibus Legum Angliæ," c. 9, expresses this for the edification of a future King in a strong condemnation of arbitrary government. It is true, the administration of justice found itself in no small embarrassment, owing to the circumstance that the older royal ordinances before Edward III. were yet to have the authority of the *statuta*, the laws passed with the accord of Parliament. Bracton helps himself by the confused interpretation that the law of the land could not, indeed, be altered without the consent of the estates, but that an emendation of the statutes was admissible by ordinance without Parliament. "*Leges Angliæ, cum fuerint approbatæ consensu utentium et sacramento regum confirmatæ, mutari non possunt sine communi consilio et consensu eorum omnium, quorum consilio et consensu fuerunt promulgatæ; in melius tamen converti possunt etiam sine illorum consensu*" (I. c. 2). In the course of the dynastic struggles the idea of the sovereignty of the people at times emerges, that idea which attributes the law to the general will of the people. This is even found in Fortescue, "De Laudibus," c. 13, "*Rex hanc potestatem habet a populo effluxam*," whence even in those times the erroneous deduction was sometimes made that the King has no further powers than those which have been given him by the law; whence, further, the denial of an independent right of ordaining in the province of the administration would necessarily follow. Parliamentary practice convinced itself of the necessity of binding ordinances, and understood a royal government according to law quite rightly, as being a government within the limits of the law, which the King cannot of his own initiative repeal or alter without the consent of Parliament. What ought least of all to be sought for in the Middle Ages are reliable statements as to the remote past. Under Edward IV. the judges declared with one accord "that all the royal courts of law exist from before the memory of man, so that no one can know which is the oldest." By this scale we must intelligently measure the genealogical trees which have been fabled for the Upper House and the Lower House, fancy ideas of Saxon laws and the wise institutions of the good King Ælfred, as well as the tradition of the Anglo-Saxon constitution.

FOURTH PERIOD.

THE AGE OF THE TUDORS AND OF THE REFORMATION.

CHAPTER XXX.

The Restoration of Constitutional Government.

HENRY VII., 1485–1509.
HENRY VIII., 1509–1547.
EDWARD VI., 1547–1553.
MARY, 1553–1558.
ELIZABETH, 1558–1603.

THE retrogression of the English constitution in the last half century of the Middle Ages, that apparent relapse into the stormy condition of the thirteenth century, is primarily attributable to a coincidence of personal circumstances. The legal relationships of the clergy and the nobility certainly still contained considerable difficulty and want of harmony (Chapter xxviii.), but it was only in consequence of the weakness of mind of Henry VI. that this degenerated into a dynastic aristocratic civil war. The political suicide of the Barons in this wild conflict, and the exhaustion which followed the war, could not but tend to strengthen the monarchy as an institution. The knighthood and the cities were in a great measure drawn into these struggles,—much against their will, for, from their social position, they were more bent upon the peaceful development of their insular political system in both county and parliamentary organization; and even the

increasing yearning of the lower orders after independence was more inclined towards a royal government than an organized rule of nobles. A newly consolidated monarchy, which sagaciously approached this social tone of the times, could rest assured of a strong support from the mass of the people.

The Tudor dynasty and Henry VII. from the first grasped the situation clearly. In the last generation the military ascendancy of the great lords was seen to be the chief danger the monarchy had to fear. Naturally the newly consolidated dynasty addressed itself first of all to the most urgent task—the abolition of the military liveries of the magnates. When the great struggle of the nobles had fought itself out, the numbers, wealth, and energy of the old families had of themselves disappeared. Though many heirs bearing old names were reinstated in their titles and honours, yet they did not regain their old possessions intact, nor their old position in respect of armed retinues, nor yet their old princely standing in the country. To keep the great barons in subjection is the principal scheme of Henry the Seventh's policy, in pursuit of which he, like his contemporary, Louis XI., appears sometimes even to have forgotten that a King is bound by honourable obligations. He kept a firm hold over his nobles, says Lord Bacon, and preferred ecclesiastics and jurists, who, although they leant toward the interest of the people, were more submissive to him. The equivocal financial artifices of his Treasury supplied him so well, that in the last seven years of his reign he only needed to summon a Parliament on one occasion.

In a more royal manner did his successor, Henry VIII., pursue the same policy. By the publication of State papers, new light has been thrown upon Henry VIII.'s merits with regard to the internal administration of the country, so that the most modern historians are inclined to estimate them too highly rather than too low. So much is correct, that the political administration displays now for the first time a systematic care for the labouring classes. Anticipating what has

in later times been called enlightened despotism, we find a regulation of wages and provisions; prohibitions of the depopulation of the land by leases of enormous tracts and conversion of arable into pasture land; prohibitions even of inventions for displacing manual labour; real provision for education, industry, and care of the poor, even for popular amusements; friendly regard for guilds, workmen's unions, and trading companies, and other measures, all framed as well as the time understood. Henry's merit in choosing out able officials is undeniable, as is the acuteness with which he understood how to place the right man in the right place. And these endeavours awoke not only a grateful response in the hearts of the poorer classes, but also an unfeigned recognition by intelligent contemporaries. The success of this administration, in internal peace and prosperity in town and country, is undisputed.

In the discharge of such tasks the secular administration remains unchanged. The only armed force of the country is now the militia, under officers and the landed gentry. The old feudal array has disappeared, and is replaced by land-taxes and fees on change of possession. In the judicial and police administration the office of justice of the peace becomes more influential by reason of the augmentation of the quantity and of the importance of its business. Beginning from below, the parishes, now that the legislature imposes upon them the economic humanitarian duties of the Church, form themselves into independent local bodies. It was not until the sixteenth century that the district and local systems became compact, independent units. As in this substructure of the constitution the principles of the period of the growth of the estates continue, their fusion together into a Parliament continues also. The formation of the Upper House follows the legal principles already existing, as does that of the Lower House. The English fundamental idea of the exercise of the royal sovereign rights by the wealthy classes, and the legislation resulting therefrom with their advice and their consent, is consistently continued.

Whilst in this manner the secular side of the State displayed a continuation of the existing conditions, about the middle of Henry the Eighth's reign a new task presented itself to the dynasty, the solution of which became its historical mission. The estrangement of the Church from its moral vocation had by this time reached a culminating point, which demanded solution. At first Henry VIII. undertook to settle the dispute between the ecclesiastical and temporal State from personal motives, and achieved his object in an energetic though ruthless and violent manner. The exclusiveness of national life and national will in England had come more and more into antagonism with the Roman Church, with its unpopular privilege of jurisdiction and its foreign head. If the Church was to become a national Church, as the popular voice demanded, then must the head of the State take the place of the foreign bishop. But in his position as the ruling head of the Church, the King became again absolute lord in that half of the State which had been hitherto organized as a Church. The ecclesiastical powers pass, in the first place, to the King as a *gouvernement personnel*, and become consolidated into a spiritual council of the State. The episcopal office becomes now subordinate to the King in council, in the form of an administrative bureaucracy, *durante bene placito*. With the episcopal office the parochial clergy becomes subordinate to the new administrative organization. With the alteration in their possessions and in their official position the clergy loses the character of a separate estate, and becomes welded into the system of the royal political administration. The old powers of the ecclesiastical *régime*, the old authority of the "holy Church," the customary relation of allegiance of the laity to the Church, form a chain of new powers of the Crown. The relations between Church and State from that time to the close of the period stand in the foreground, and are of such all-engrossing interest, that it appears appropriate to review: first, the *permanent* elements in the history of the period, viz. the development of the county-system, and the constitution of Parliament (Chapters xxxi.,

xxxii.), and then the Reformation, the new organization of the State Church, and its effects upon the fundamental character of the royal government (Chapters xxxiii.–xxxv.). (*a*)

(*a*) Of the sources and literature of this period we may point out the following:—

1. The records of statutes, which are, after 4 Henry VII., exclusively in the English language. The separate Statute Rolls end with 9 Henry VII., and are merged in the *Rotuli Parliamentorum*. The complete legislation of the period is contained in the official collection of laws (Statutes of the Realm, 1810, *seq.*), vol. ii. pp. 499–694; vols. iii. and iv.

2. The parliamentary proceedings after 12 Henry VII. exist in the *Rotuli Parliamentorum* as original documents in the Parliament Office. With 1 Henry VIII. the official "Journals of the House of Lords" begin, printed with a general index, and a special calendar from 1 Henry VIII. to 30th August, 1642. The "Journals of the House of Commons" begin with 1 Edward VI. (1548).

3. Other State papers of immense extent exist in the Record Office, and are published in numerous series. The proceedings of the council of the realm (Sir H. Nicolas, "Proceedings," etc.) extend down to 33 Henry VIII. The State papers of the time of Henry VIII. are in print, vols. i.–xi. (1830–1852). "State papers" (1571–1596), by Murdin, 1750, fol. "A Calendar of the State Papers, 1547–1580," by R. Lemon, 1857, with continuation.

4. "The History of the English Law," by Reeves, 1815, embraces in vols. iv. and v. the period of the Tudors. Sir Edward Coke's "Institutes," Part II., form a chief authority for public law.

5. For the general political history: Hallam, "Constitutional History," vol. i.; Lingard, "History of England" (from the Catholic point of view). With extensive studies of the sources: Froude, "History of England since the Fall of Wolsey," etc., 1858, *seq.*, vols. i.–xii. (a spirited apology for the Tudors, especially Henry VIII.). Pauli-Lappenberg, "Geschichte von England," vol. v. (down to Henry VIII.). Ranke, "Englische Geschichte," especially in the sixteenth and seventeenth centuries, vol. i. (1859). For limited purposes: Fr. Bacon, "Historia Regni Henrici VII." Amst., 1662. Lord Herbert, "Life and Reign of Henry VII.," 1649 (official). Camden, "Annales Britt. regn. Elizabeth." Th. Smith, the "Commonwealth of England," London, 1589 (for the political situation in Elizabeth's day).

CHAPTER XXXI.

The Development of the County Constitution.

The fundamental institutions, upon which the vital energy of the parliamentary constitution is built up, were developed and extended by the Tudors in a manner that of itself affords us sufficient proof that these monarchs sincerely desired the maintenance of the constitution. The combination of the sovereign rights with the local system continues in every direction, and, striking its roots deeper down, draws the smaller households into the activity of self-government.

I. The **militia system** gains in importance by the fact that it forms the sole legal force of the country. The old feudal arrays are now in practice abolished; the aim of the Tudors is unswervingly directed towards abolishing the retinue and condottiere system of the higher nobility. A return to conditions similar to those under the house of Lancaster has become impossible, owing to the fact that a great foreign war has been avoided, and the nobles have gradually become unaccustomed to regular campaigning. (1) The whole care of the Tudors was, on the other hand, concentrated upon the county

(1) Compared with the militia system of this time the remains of the feudal militia are only sporadic phenomena. In like manner the material dies out with which the battles of the Roses were fought. The Marches on the borders of Wales and Scotland, as military governments with a feudal aspect, were abolished under Henry VIII. As a natural consequence of the situation, the provincial nobility on the borders retained a military character down to the time of the union with Scotland. The habitual exercise of arms was comparatively general among the population, in consequence of which, in the county of York alone, the men capable of bearing arms were estimated at 40,000.

militia, which in the Scotch wars, and yet more frequently on the Continent, had proved itself efficient. For cases of need, the custom was revived of compelling the counties to furnish a definite number of men. The legislature assisted in this matter by certain provisions touching the military service of the royal vassals and officers (19 Henry VII. c. 1, and special statutes), and touching the military subordination of the men to the captains set over them. Under Henry VIII. for the first time extraordinary commissioners were appointed for this purpose, who, as lieutenants of the King (in later times lord lieutenants), furnish the required number by forcible recruiting. In the times of the Catholic troubles in 3 Edward VI., such lieutenants are mentioned for the purpose of "bringing the counties into military order." These powers were legally recognized by stat. 4 and 5 Philip and Mary c. 3, which presupposes the existence of such royal lieutenants. At the same time, by a new militia statute (4 and 5 Philip and Mary c. 2), the liability to bear arms was graduated afresh, and a suitable change made in the military system. The militia statute distinguishes all secular persons with *free landed estates* according to the scale of £1000, 1000 marks, £400, £200, £100; 100 marks, £40, £20, £10, £5: and next, persons in possession of personal estate of 1000 marks, £400, £200, £100, £40, £20, and £10. According to this scale the liability to an equipment of a greater or lesser number of persons was determined. Other persons of yearly incomes, either from copyhold or entailed estates of the clear annual value of £30 or more, are to be burdened according to the scale of personal property; all other inhabitants who are not specially contained in the former scale, are to keep at the public expense such equipments and arms as the royal commissioners shall determine. The justices of the peace have to superintend the procuring of horses and accoutrements. At times when the armed force is assembled, offences in service shall be summarily punished by the commanding authorities. In a state of actual war, according to 7 Henry VII. c. 1, 3 Henry VIII. c. 5, 2 and 3 Edward VI. c. 2, sec.

6, 5 Elizabeth c. 5, desertion is punished as felony. Even when in later times James I. repealed this chief statute, the *Mustering Statute* still remained in force; only the definite gradations of the liability to military service were abolished, but the administrative powers for recruiting the soldiery, and the penal laws affecting desertion, were retained. (1[a])

II. **The judicial system** is in this, as in the following, century the most stable part of the political system, the only progressive element being in the office of justice of the peace. Apart from this the system is unchanged, based upon judge and jury, and upon a systematic co-operation of royal officers and committees of the townships in the civil and criminal assizes, and in the quarter sessions of the justices of the peace. The lists of jurors are, in the old fashion, formed of the usual class of persons, the necessary members for each county assize being furnished by the sheriff, and in the municipal quarter-sessions by the secretary to the court. The qualification for service on a jury was raised by 27 Elizabeth c. 6, in order to correspond with the change in the

(1[a]) The commissions of array of this period are not quite in harmony with the earlier parliamentary statutes, which confine the employment of the militia to foreign wars. But the Parliaments found it to be to their general interest to allow the government a wider scope for action, so as to avoid a recurrence to the old feudal service. Moreover, the Tudors felt no need for introducing standing armies, either for the national defence, or for extending their sovereign powers. Some scruples were in later times aroused under Elizabeth by the application of martial law to civil persons. Elizabeth proclaimed martial law for the first time after the rebellion in the North, in the year 1570, but on the representations of her council desisted from the application of it, evidently out of regard to Magna Charta. Yet, in 1588, when an invasion of the Spaniards was imminent, an ordinance was issued, which provided that the circulators of papal bulls and revolutionary pamphlets should be punished by the military commander. In the year 1595 a provost-marshal was even appointed by commission to seize, on the information of the justices of the peace, "notoriously rebellious and incorrigible offenders," and to have them hanged in the presence of the magistrates. The Queen guarantees in advance indemnity to the officials for these illegal proceedings.

The new military code of 4 and 5 Philip and Mary, has, as before, for its chief subject the duty of equipment, which makes serious demands upon the wealthier classes, upon the landowners of £1000: six horses with weapons for the heavy armed, ten horses with weapons for the light cavalry, forty lighter suits of armour, forty thin-plated suits of armour, thirty long bows, thirty helmets, twenty halbards, twenty arquebuses, twenty light helmets, and so forth downwards. "*Liberi homines*" are no longer spoken of, but copyhold and every kind of personal income is rendered liable. Cap. 3 contains also the penal rules directed against such as avoid the muster.

value of money, from forty shillings freehold to £4, and the rating of a knight's fee was at this time reckoned at £40 instead of £20 rent. The fact which has to be decided by the jury, is in practice reduced to a regular trial by means of witnesses, in which the jurors return a general verdict upon the evidence brought before them. By 1 Edward VI. c. 1 the admission of witnesses for the defence in the proceedings in evidence before the jury is legalized. The continuous co-operation of judicial officials and committees of the townships, in which knights, citizens, and peasants meet together each year, still forms the actual nucleus of the municipal constitution. In certain cases the jury shows itself partial out of sheer fear, or is empanelled in a partial manner by officious sheriffs. But it is so closely interwoven with the legal conceptions of the times, that Henry VIII. constitutes the commissions of his Royal High Court with a jury, and extends the jury system also to the Court of Admiralty. Existing abuses led to the stat. 3 Henry VII. c. 1, introducing a summary penal procedure before the justices of the peace, on account of "concealments of inquests," against juries who fail in their duty; but this procedure was found impracticable. More serious was the later penal jurisdiction of the Star Chamber, which sometimes visited the juries with rebukes, and with pecuniary fines, or even threatened them with imprisonment. Nevertheless, there was as yet nothing like a powerful tendency militating against the independence of the jury. (2)

In addition to this current administration of justice by

(2) The factious spirit of the age had certainly, at the beginning of this period, affected the jury. Not only the statutes, but the historians also confirm the fact that the results of the Wars of the Roses had affected juries, and were partly the occasion of the institution of the Star Chamber, "since the good order and peace of the realm were imperilled by illegal institution, corruption, dishonest behaviour of the sheriffs in the preparation of the jury-lists, bribery of the jurymen, etc." The Star Chamber had, moreover, in the era of the Tudors, not as yet disturbed the course of the ordinary administration of justice. For single attempts to intervene against the verdicts of juries by penal sentences, see Hallam, "Constit. History," i. c. 1; as to a certain dependence of the jury under Elizabeth, see chap. v. of the same. As a rule the Star Chamber was contented with an apology. Only the case of the acquittal of Nicholas Throckmorton under Mary made much noise among the con-

judge and jury, the sheriff's county court still continues; by 2 and 3 Edward VI. c. 25 the regular holding of this once in each month was enjoined. The idea of the institution is, however, rather to procure a periodical discharge of the current business of the county, beside which the remains of a civil jurisdiction in petty affairs are gradually decaying. As an assembly of suitors, the county court appears for the same reason almost of nominal importance, and politically important only by reason of the business of county elections.(2[a])

The local court leet still lingers on in some places with a portion of its old functions. Just as decayed, and, as a rule, only active in non-judicial business, are the old manorial courts. The civil jurisdiction which had been granted to certain cities appears at this time to have remained side by side with the assizes in full practical working.

III. **The county police system** shows an extension of the office of justice of the peace in a threefold direction. (3)

temporaries. The jurors were thrown into prison after their verdict. Four of the number who confessed their guilt were set at liberty; but the rest, who endeavoured to justify their conduct, were condemned by the council to fines of one thousand to three thousand marks, which were, however, in the end partly remitted. The dangerous statute, 11 Henry VII. c. 3, which gave the justices of the peace a summary penal jurisdiction by virtue of penal statutes, was the outcome of financial influences; but after the innovation had made itself thoroughly unpopular, on Henry VIII.'s accession the leading officers, Empson and Dudley, were sacrificed, and the whole institution was repealed by 1 Henry VIII. c. 6.

(2[a]) In accordance with the statute 14 Edward III. c. 7, the sheriffs were annually presented to the King by the Lord Chancellor, the Treasurer, and the judges (State Papers, i. 114). The under-secretary in the Remembrancer's office had for this purpose to keep a list of the persons who were named by the high officials as qualified (Thomas, "Materials," 12). The sheriffs still annually present their accounts in the Treasury, as enjoined by 35 Henry VIII. c. 16.

(3) As to the police system, *cf.* the detailed description in Gneist, "Gesch. des Self-Government," 291–308, in which the almost insurmountable mass of legislation has been arranged under leading points of view. For the extension of the office of justice of the peace, Reeve's "History of the English Law," vols. iv. and v. (notably vol. v. p. 227 *seq.*) contains much matter. The statutes of this century are of exceedingly wide scope and often prolix. The comprehensive work of Lambard, "Eirenarcha, or the office of a Justice of the Peace," which in its different editions (1579–1619) gives an exceedingly clear survey of the progressive extent of the office, may almost be ranked as an original source of information. The further advance of the office is to be gathered from the editions of Dalton's "Justice of the Peace," 1618. The party struggles of the Wars of the Roses had left a legacy of a spirit of passion and demoralization in a generation that had grown up under

1. The justices of the peace are charged with the duty of the preliminary investigation in criminal cases of all kinds. This new position is attached to the right of taking bail of the accused (3 Hen. VII. c. 3), which was by a general regulation (1 and 2 Philip and Mary, c. 13; 2 and 3 Philip and Mary, c. 10), determined as follows:—that at least two justices of the peace, one of whom must be learned in the law (forming a *quorum*), present at the same time, were to take the bail and report it in a despatch under their own hands to the next ordinary criminal assize. But before this is done, they must draw up in writing an *examination* of the party arrested, and an *information* by those who bring him in, touching the facts and the circumstances of the case, so far as this is essential to the proof of the crime, and send it in to the criminal assizes. Thus was legally instituted a hearing of the party accused and an examination of the witnesses by way of preliminary proceedings, and the justice of the peace was at the same time empowered, by taking security, to bind over the prosecuting party and the witnesses to prosecute and to give evidence in the subsequent judicial sittings. This preliminary inquisition can take place in every case, whether bail appear acceptable or not, and forms the preliminary examination in the English trial, as it exists in our day. In addition to this extended function of the justices of the peace, there stands in the background their higher position as a regular criminal court with a jury in the quarter sittings of the bench, which in the general form of the commission rivals the criminal assizes of the itinerant justices. (3[a])

party struggles. The statute fixing the limits of the penal jurisdiction of the Star Chamber (3 Henry VII. c. 2) was also directed against the abuses of the office of justice of the peace; but this was probably occasioned by the state of the times.

(3[a]) The practical development of the police control takes this course, that the original liability of the whole tithing passes to the "reeve and the four men," whilst that of the hundred passes to the grand jury. The latter now relieves the local unions of the difficult duty of presentments, by hearing the informer, gaining sufficient information from the evidence to draw up an indictment upon its own responsibility, which had originally to be done by the individual hundreds of their own knowledge and information upon their oath. If we consider what an extraordinary relief was afforded the tithings and hundreds by this proceeding, we can understand that these innovations of practice were on all sides

2. Secondly, a consolidation of the *police laws* of the Middle Ages was effected, primarily with the object of making them more easy of individual application. Even where no important and material changes had been made in the statutes already passed, this extended legislation is made ready to the hand of the justices of the peace, and at the same time extended to new and important spheres.

The *regulations affecting labour*, for which the justices of the peace are the successors of the old justices of labourers, become consolidated into a great system, connected both with police and with the poor law establishment, which was finally completed in 5 Elizabeth c. 4. This statute contains a long list of pecuniary fines (information to be laid before two justices of the peace, with a share to the informer), coercive measures to be taken against unemployed persons, domestics, or those belonging to industrial trades, regulations affecting domestic service in the country, rules affecting the servants' characters, police jurisdiction regarding notice and disputes in service,

as willingly adopted as was in somewhat later times the inquisitorial activity of the paid officials on the Continent. Thus arose the procedure before the grand jury as it continues to the present day. In this exercise of the centralized presentment-duty it became more and more evident that the function of the bench was limited to legal decisions (in this case to the inquiry whether the indictment is founded well). The other steps in criminal prosecution are only proper to be dealt with by individual officials. Accordingly the method was adopted which the legislature had taken in the case of the office of police magistrate; that is, a devolution of certain functions from the body of the justices of the peace to individuals. The individual justices of the peace undertake accordingly: (1) the "previous information" by hearing the accused and the principal witnesses for the prosecution, that is, the same matter as had been originally left to the hundred jury *privatim* as preliminary to their verdict. (2) They decide upon this information as to the acceptance of any proposed bail. (3) They send the matter they have collected on information to the next assizes or quarter sessions (with or without the person of the accused), to obtain there the verdict of the grand jury. This "commitment" again relieves the communities of a wearisome duty; for originally the hundred was obliged to present the indictment personally by twelve of their number. (4) The justices of the peace provide at the same time for the future "trial in court," by binding over the informer and the principal witnesses to appear on the occasion. This duty of informing and hearing witnesses is again only an emanation of the old duty of the community to present their members who have knowledge of the deed for the purpose of *veritatem dicere nec celare*. What accordingly was the duty of the community individually and collectively is now performed by the informer and the witness in the name of the rest. Thus arose the practice of preliminary examination as it now exists, and which received a desirable assistance from the law (Coke Inst. iv. 177).

and regulations affecting the amount of wages and hours of labour. With this law and that relating to the poor, a system of compulsory apprenticeship was intimately connected, which was enforced by order of the justices of the peace as well against pauper boys and girls as against their masters.

The *legislation against vagabonds and beggars* (39 Elizabeth c. 4), which is connected with this, gave rise to a complicated system of magisterial powers affecting domicile, vagabonds' passports, and the payment of transport and criminal expenses.

The *trade regulations* of Elizabeth (5 Eliz. c, 4), introduce for the civic trades, so far as they have the character of a technical handicraft, a seven years' apprenticeship, in addition to a magisterial jurisdiction of the justices of the peace over disputes between master and apprentice. Side by side with this is continued the earlier legislation touching the manner of carrying on certain trades, particularly woollen manufactures, brewery regulations, butcher and baker regulations, and the like, with the intent to secure honest labour to the public.

Under the Tudors a beerhouse licensing system was introduced by 7 Henry VII. c. 2, 5 and 6 Edward VI. c. 25. Analogous is the necessity of licences for buying up or dealing in corn, butter, and cheese, according to 5 Elizabeth, c. 12, sec. 2. (3[b])

(3[b]) The following may be noticed as supplementary :—

The system of the regulations affecting labour developed itself under the Tudors to a legislative machinery bound up intimately with police and poor laws. This magisterial treatment of "labour for hire" attains its culminating point in the stat. 5 Elizabeth c. 4 (which in the main is still in force), interspersed with a long list of rules for servants, labourers, and artificers.

The licensing system for public-houses is new. By 5 and 6 Edward VI. c. 25, two justices of the peace may prohibit the sale of beer in low houses and taps, and allow no alehouse which has not been publicly licensed at the sessions and by two justices of the peace. "And that the said justices of the peace shall take bond and surety from time to time by recognizance of such as shall be permitted to keep any common alehouse as well for and against the using of unlawful games as also for the maintenance of good order." The quarter sessions shall further investigate whether any act has been committed by the innkeepers which justifies a forfeiture of the security they have given.

A new subject of legislation is the regulation of the government of prisons. The houses of correction had from the first served the purposes of the police in supplementing the poor law administration, and for those averse to labour, beggars, runaway servants, and vagabonds (Coke, Inst., ii. 725–732). The old county prisons, on the other hand

As a result of the Reformation, a penal legislation is set on foot against papists, conventicles, and dissenters, after 5 Elizabeth—a peculiar province and one that offends our religious ideas,—the application of the penalties of *præmunire*, and in many cases even of high treason, to religious nonconformity, and the inflicting of pecuniary fines to enforce external conformity. This penal system was at first directed against the papists, but afterwards also against the sects which dissented from the State Church. (3c)

All these functions were committed sometimes to one, sometimes to two, or in rarer cases to three, four, and six justices of the peace. The point of view was in this respect an empirical one, according as, from the nature of the business, the assistance of a justice of the peace, learned in the law, was considered advisable, or for other reasons a mutual control was preferred.

But as in the German system the institution of a bench of justices proved impracticable for dealing with petty cases, so in England the experience was made in every generation, that the system of trial by both judge and jury was impracticable for the majority of petty criminal cases. The preceding period had as far as possible avoided any open deviation from it. The summary penal powers of the justices of the peace were in those days hidden under their extensive right of arrest until the next session, and other indirect measures, which

which legally belong to the ordinary administration of criminal justice, still remain under the inspection of the sheriff, whose right was expressly confirmed by 14 Edward III. c. 10, 19 Henry VII. c. 10, 23 Henry VIII. c. 2.

(3c) The single acts that are of practical importance for this period are: "*Agnus Dei*"; the importation of church pictures, crosses, etc., threatened with the penalties of *præmunire* (13 Eliz. c. 2, 3, 7, 17; 23 Eliz. c. 1 sec. 2). "Books and relics;" two justices of the peace shall search for Catholic books and relics, and destroy them when found; crucifixes are to be broken at the quarter sessions. "Jesuits and priests" (27 Eliz. c. 2. sec. 13). "Impugning supremacy;" persons over sixteen years of age who keep away from church for longer than a month, or who dispute the royal supremacy, or attend conventicles, to be arrested by a justice of the peace, until they conform (35 Eliz. c. 4 sec. 1). "Maintaining the Pope's jurisdiction": punishment of *præmunire* 5 (Eliz. c. 1. secs. 2 and 15; 23 Eliz. c. 1, sec. 2). "Mass": the celebration or hearing of a mass to be punished with two hundred [one hundred] marks and imprisonment for a year (23 Eliz. c. 1. sec. 4). The simple "not repairing to Church" without weighty excuse belongs to the cognizance of a single justice of the peace (23 Eliz. c. 1. sec. 5).

in fact actually involved a penalty. With this period a power of summary conviction comes into direct prominence. Even in the above-mentioned groups of legislation numerous punishments before one or two justices of the peace are included, which, after the era of the Stuarts, increase to an almost unlimited extent.

3. Thirdly, the office of justice of the peace becomes the *superintending magistrature over the newly formed parochial system*, embracing the discretionary powers over the local police, the poor law, the highways, and local taxation. The local officers are under the specially regulated control of the justices of the peace, whose quarter sessions form a general court of appeal for complaints of the administration. The sessions of the justices of the peace acquire more and more completely the position of a district board, discharging by its orders a mass of administrative business, which, according to the various nature of the various objects, is sometimes committed to the quarter sessions, sometimes to a smaller committee, and sometimes to two, or even to one, justice of the peace. They appoint the staff of overseers of the poor, and now that the courts leet were in a state of decay, as a rule the constables of the parishes also. (3[a])

All larger powers were altogether comprised in the periodically constituted commissions, which, after being again in the year 1590 revised by the courts of the realm, adopted the form which they have retained until this day. These commissions, analogous to those of the itinerant justices, establish by their uniformity a fixed constitution of the magisterial office, which, amidst all the vicissitudes of political tendencies, became an important guarantee. All the more necessary did the retention of the royal right of appointment appear, which was again, in 27 Henry VIII. c. 24, categorically insisted upon.

IV. The participation of the counties and municipal boroughs in assessing and raising the parliamentary taxes

(3[a]) The substructure of the parish and its subordination to the justices of the peace and the central administration is described below in Chapter xxxvi.

remains primarily unchanged. The internal independence and consolidation of the parochial life became materially enhanced owing to a new system of local taxation, which has now become the chief basis of the English parochial constitution, and to which, as being a permanent and principal creation of the royal ecclesiastical *regîme*, we shall again refer at the close of the period (Chapter xxxvi.). We must point out here in anticipation thus much, that it was owing to the statutes of this age that the parish first became an independent and living member of the political system. As church and parsonage were the centre of the ecclesiastical parish, so also the poor-law and highway officers, and the poor rates and highway rates were the living bond that united parish and State together. The vestries with their rate meetings and elections of officers receive an impulse to reconstruct governing parochial committees and to independent activity in diverse directions. For the independent life of the small parishes the period of the Tudors is in a certain sense the normal era. (4)

V. Lastly, the **municipal system of the borough**, is a creation composed of these elements in which the more modern parochial system coincides with the older judicial and police system. In the municipal parishes the system of churchwardens, overseers of the poor and highways, and the rating connected therewith, was established just as in the rural parishes. But this new creation went its own way without any connection with the old borough government, which was developed out of the court leet, and served for the judicial and police administration, for the office of justice of the peace and the constitution of the jury, as well as for the administration of the older landed property of the town. Through this

(4) Touching the development of the constitution of the parishes, see below, Chapter xxxvi. The characteristic features in this new creation are the local offices: churchwardens, overseers of the poor, overseers of the highways, and the old constables, who now form a system of personal activity, each mutually supplementing the other, in the small parochial life. And then the system of communal taxation, the liability of all occupiers, without regard to freehold or copyhold, property, hire, or rent. The aggregate of the households became thus on this lowest step drawn in principle into the public life.

separation the municipal *regîme* became more and more isolated, and this isolation was particularly favourable to the continuous formation of smaller bodies. The court leet had, as a rule, little to do any longer; its current activity lay in the hands of the justices of the peace. For the administration of the old urban property there still existed a town council, etc., but this government was in most cities unimportant. This actual condition of things now became legally fixed by charters of incorporation. The newly granted charters of this period often put the municipal government and sometimes also the parliamentary franchise into the hands of committees or common councillors, who were appointed the first time by the Crown, and afterwards supply their number by co-optation. The election of the municipal officers is conducted by a smaller committee of capital burgesses, a governing body, or a select body, which fills up its number by co-optation. Where the charter does not sanction it, a right of this description can also be established by "statutes, prescription, or old custom." The evil result of this principle of incorporation was the arbitrary formation of the body of citizens, which excludes the burgesses who were entitled according to the old civic constitution, and in an equally arbitrary manner admits foreigners to honorary citizenship. Thus was the way prepared for that condition of things which, under the Stuarts, made the municipal corporations the principal theatre of party struggles and of violent encroachments of the government. (5)

(5) As to the constitution of boroughs, *cf.* Gneist, "Gesch. d. Self-Government," 318–325. There were at this time fifty-four charters of incorporation, forty-three charters of non-incorporation, granted to different towns. The basis of the "corporation" is not the whole civic community, but a smaller body, the election or co-optation of which is left to usage or especial provisions, and which obtains the rights of a juristic *persona*. We cannot as yet assume an intentional tendency to a malformation of civic constitutions. Nevertheless, a governmental system already appears, which, by means of the boroughs dependent on the Crown, endeavours to keep the Lower House in harmony with the political government; and for that purpose creates new boroughs, which were presumably subservient to the Crown. The political government shows also an inclination to decide according to this view all doubts which arise with regard to the franchise. An opinion of the justices, rendered to the Privy Council in Michaelmas term, 40, 41, Elizabeth, was therefore important in its consequences, by which was declared the legality of select

Apart from this weak point the legislation of the Tudors shows in this province also a permanent gain. The new elements of the community combine with the already existing institutions for the maintenance of the peace, and form in combination an important member of the life of the community, and a primary basis of the State, to which I shall recur at the close of the period (Chapter xxxvi.).

bodies, the powers of the same to make by-laws, the recognition of "long usage" in such matters, and the admissibility of an election of municipal officers by a committee or a common council. Contempt for the political importance of the inferior burgesses, over-estimation of the permanent influence of the Crown upon the small townships, but especially the adherence to old custom, were the reasons for allowing this state of things to continue.

CHAPTER XXXII.

The Progress of the Parliamentary Constitution.

As the living roots of the free constitution live on in the parochial system, so their fusion in Parliament also continues. All that is changed is (as in the fifteenth century) attributable to a shifting of the factors of force, which, in consequence of the decay of the great nobles, and of the reformation and social conditions of the times tend now again to the advantage of the Crown. The "King in Parliament" of the sixteenth century resembles more the political system existing under Edward III., than the conditions as they existed under the house of Lancaster. The executive appears, as formerly, in the shape of a monarchy, surrounded by its more or less intimate counsellors, in the three customary gradations.

I. **The Continual Council,** now called **The Privy Council,** combines the Cabinet Council and Privy Council in one body, with the King for a personal president. The Privy Council is now again the seat of the actual government, the advising council of the King in the exercise of his prerogatives, formed according to his free choice, partly of spiritual and partly of temporal peers, partly of members of the Lower House, and partly of mere professional officials. The latter, as such, have indeed no longer a voice in the *Magnum Consilium* of the magnates; but the importance of the royal office had increased so much with the restoration of the monarchical form of government, that Henry VIII.'s rules of precedence give to the great officers, if they are also peers, precedence

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over the dukes. By the increase of power that accrued to the Crown as a consequence of the Reformation, the Privy Council attained such an enlarged sphere of action, that it requires, as being the source of a new administrative law, a special description (Chapter xxxv.). (1)

II. The Magnum Concilium of the prelates and barons, the *Upper House*, has passed over into the epoch of the Tudors as an hereditary council of the realm. Henry VII. could only summon to his first Parliament twenty-nine temporal lords, and among them many recently ennobled. Others were later restored to their rank, and partly also to their estates, and until Elizabeth's death the temporal peers were moderately augmented, so that the number of earls had at one time been raised to nineteen, and that of the barons to forty-one. To these were added one, two, or three dukes, marquises, and viscounts respectively. The aggregate number of the newly created peerages, as well as of those advanced in rank, is given as follows:—under Henry VII., twenty; under Henry VIII., sixty-six; under Edward VI., twenty-two; under Mary, nine; and under Elizabeth, twenty-nine. The Tudors restrict their creations, with scarcely an exception, to the old knightly families. Only once did the aggregate of the temporal peers under the Tudors reach the number of sixty. The alteration in the state of things was here most apparent owing to the

(1) The members of the council belong to Parliament partly as being peers, partly as deliberating members of the Upper House, and partly as elected members of the Lower House. The justices of the realm, the attorneys-general, and others are now only summoned as legal advisers of the Upper House with the customary writ "*ad tractandum nobiscum et cum cæteris de consilio nostro;*" whilst the writ of summons of the peers ran "*ad tractandum nobiscum et cum cæteris Prælatis, Magnatibus, et Proceribus.*" Their names were in the writs always placed after those of the peers. In the statute of precedence (31 Henry VIII. c. 14), a separate place was assigned to them in the Upper House outside the ranks of the voting peers. The members of the Lower House, who are honoured with an office in the Privy Council, take on the other hand a distinguished position, and are frequently, as a smaller committee, entrusted with the decision of important political questions. In 35 Elizabeth, on the 10th April, 1593, the Queen expresses her displeasure on account of "irreverence towards the members of the Privy Council who are to be considered as her 'standing councillors' in contradistinction to the temporary members of Parliament" (Parry, 234). In 6 Mary, the Lord Chancellor appeared with other lords in the Lower House, and took his seat in the place set apart for privy councillors; whereupon the Speaker left his chair and took his place with the privy councillors (Parry, 213).

disappearance of the organized military forces of the great barons. The Upper House had thus in a certain sense returned to the conditions existing in the fourteenth century. The centre of the State lies again in the Privy Council, and the influence of the peers principally in their being called to fill the chief offices of State. It was in this brilliant nobility, that had now become recognized as hereditary, as well as in the bishops, who could be deposed at will, that the requisite majorities were found for the violent deeds of Henry VIII., as well as for the changes of religion of Henry, Edward, the Catholic Mary, and the Protestant Elizabeth. A permanent influence was exercised also upon it by the Reformation, which caused the disappearance of a fixed number of twenty-six regularly summoned abbots and two priors. In the Parliament of the 13th April, 1539, only twenty spiritual peers appear, as against forty-one temporal; but both sides are affected by the same spirit, which on the Continent made the nobility subservient, by attracting it to the Court, and by preferring it to the great offices. For more than a century the nobility ceases to represent the rights of the nation. Influence and pre-eminence in all that had a charm in those days, was now dependent upon the royal favour, to gain which the old families vied with the newly created favourites. (2)

(2) The spiritual peerage is restricted, since the abolition of the monasteries, to the archbishops and bishops. The abbots sat for the last time in the Upper House on the 28th June, 1539 (31 Henry VIII.). The Abbot of Westminster, who, under Mary, was alone reinstated, sat at the beginning of Elizabeth's reign for one day in Parliament, that is, on the 8th May, 1559. The Act of Uniformity (1 Elizabeth, c. 2) was passed in spite of the opposition of all the bishops, for which reason the spiritual lords were passed over in silence in the preamble to the statute. As early as 7 Henry VII., the justices had declared that the King might hold a Parliament without all the spiritual lords (Coke, Inst., ii. 585-587). With regard to the personal position of the temporal peers, it is worthy of note that Henry VIII.'s harshness displayed itself pre-eminently upon the favourites he had himself raised up, whilst otherwise he proved himself to his temporal peers (many of the younger of whom had been his feudal wards) a benevolent, generous, and obliging lord. But the breach in the position of the old ruling class is nowhere more clearly visible than in the fact that the right of a peer's jurisdiction, which had been with difficulty attained, had become almost a *privilegium odiosum*. The ordinary procedure by impeachment makes way for the *bills of attainder* by which the King causes his fallen favourites to be condemned in legal form. Placed in an intermediate position between the royal will and a consenting majority of the Commons, the

III. **The Composition of the Lower House** was but little changed in the transition from the Middle Ages to the age of the Tudors. Certain extensions were made by the fact that under Henry VIII. 27 members of Parliament for Wales were added, as well as seven members for the county palatine and the city of Chester, which had now become incorporated with the parliamentary constitution. Still more owing to the fact that a number of older boroughs were restored, and other new ones summoned; under Edward VI., 22; under Mary, 14; under Elizabeth, 62 fresh members. The increase and the constitution of the body down to the close of the period is discernible in the parliamentary writs at James I.'s accession, to whose first Parliament 467 members were summoned; among them 231 knights, 140 esquires, 71 gentlemen, nine merchants, one mayor, nine aldermen, four doctors of law, and one serjeant of law. In spite of the growing power of the royal prerogative, the *communæ* feel themselves, in the face of the ever-increasing money demands, upon firmer ground than the temporal and spiritual peers. The whole weight of the public activity of the landed interests and their influence in the parliamentary elections, falls upon the military and police administration. The influential participation in the affairs of State is now accordingly centred in the commissions of the peace. At the head of the commission there regularly stood as *custos rotulorum* (at the same time generally in the capacity of lord lieutenant of the militia), a temporal lord of Parliament, with a large number of "gentlemen."

This "gentry," as each generation passed by, widened its circle, in proportion as property and the public position upon which it was based became more extended. In another direction the number of freeholders increased in consequence of the secularization of the monasteries, the divisibility of landed estates, and the freedom of devise by will after Henry VIII. Still more had the improving agriculture and trade in those

hereditary council of the Crown dares to offer no more opposition. With regard to the competence of the Upper House, its position as a Court of Appeal, on a writ of error, although fallen into comparative disuse, was expressly confirmed by 27 Elizabeth, c. 8.

towns that had become wealthy, increased the ground rent of the smaller ones. The middle classes in the towns increased by the rise of trade and commerce, favoured by the care taken of guilds, labourers' unions, and companies, and by the provision made for assuring to them a certain livelihood and fair trade. An indirect recognition of the importance of the Lower House is shown also by the fact that, in important crises, the Tudors begin to exercise a personal influence upon the elections. An innovation of the times has been introduced in the election of the Speaker, who is now appointed, as a rule, by the King, and accepted by the consent of the House, in order, it is alleged, to avoid loss of time in disputing (Coke, Inst., iv. p. 8). Repugnant as was the enhanced position of the Lower House to the statesmen and ecclesiastics of the age, yet the Tudors, in the few cases of any serious collision, yielded in this direction, and particularly in the voting of money, and the question of monopolies. It did not escape their comprehension that the local unions gained an increasing independence by reason of their self-activity and money-voting powers, and that the royal government must find its strength by being in accordance with the national spirit and with the right needs of the country. (3)

(3) In the Reformation Parliament of Henry VIII., there sat 298 members. On important occasions of this kind the Tudors did not scruple to exercise their personal influence upon the election. In 7 Edward VI., the sheriffs of the various counties were even commissioned to return certain persons who had been designated by the King. In 2 Mary, the order to the sheriffs was that they should return from the counties and towns, men "of the wise, grave, and Catholic sort." The number of Court officials and such like dependent persons was also under Elizabeth a considerable one. Her influential ministers, such as Hatton, Knollys, and Robert Cecil, not only sat in the House, but also took a lively share in the debates. These members were able with the greater ease to gain an influence, as the sittings of the House were not very numerously attended. Even in important debates at most 200 to 250 were usually present. A list of the boroughs represented in parliament since 1 Henry VIII. is given in the "Parl. History," vol. vi. The regular leadership, which the knights of the shires had taken upon themselves in the Lower House in the fifteenth century, has now ceased, in consequence of the dictatorial position of the monarchy. With the abatement of party struggles, the municipal members appear all the more as representatives of material and local interests. It is, however, a symptom of a growing political influence, that we now frequently find strangers to the city canvassing for municipal parliamentary seats, in all which cases, the limitation of the legal eligibility was easily evaded by a grant of the freedom of the borough.

This position of the King in Parliament is proved also in detail, when the three fundamental provinces of Parliament, viz. *legislation, taxation,* and *administrative control* are examined.

1. *The legislation by Parliament,* under Henry VII., began, which recognized the title to the throne, or rather re-created it. The succession of all five monarchs of the house of Tudor was based upon parliamentary statutes. The work of reformation was, in all its most important details, brought about by the resolutions of the Parliament convened on the 3rd of November, 1529, and, in fact, principally by motions of the Lower House; the whole of the later acts of *supremacy* and *uniformity* are likewise due to parliamentary legislation. The dynasty could just as little dispense with the full co-operation of Parliament for its work of reformation, as the ruling princes of Germany could with their *Landstände.* The century of the Tudors is more parliamentary than any preceding one, in so far as no Parliament ever had more important problems to solve, especially in regard to ecclesiastical affairs. It was now the established legal opinion that the estates were only *permanently* bound by *what* they had joined in enacting. Still more firmly rooted was the idea that what had once become law by the joint action of the three estates, could only be again altered with their consent. All important measures in Church and State were thus brought into the sphere of parliamentary legislation. Bills which were initiated by the Crown were indeed accepted as a rule. When, however, in 1532, the Lower House on one occasion rejected a bill, Henry VIII. surlily submitted, but without further attempts. Several instances of the kind follow under Edward, Mary, and Elizabeth. The statute 31 Henry VIII. c. 8, certainly contained a far extending recognition of the legal sanction of royal ordinances; but its declared intent was only the maintenance of certain rules in religious matters. That no further meaning lay concealed, is shown by the proviso, "that no one be injured in real estate, in liberty, or in person, nor the laws and customs of the realm subverted thereby." Moreover,

this statute was repealed with all haste in 1 Edward VI. Elizabeth issued more numerous ordinances, but their constitutional validity must be determined according to the customary principle of a concurrent legislative power. There is nothing to be seen of any tendency to evade Parliament by ordinances. Mary herself indignantly cast into the fire a servile book advocating this practice. When in 14 Elizabeth a bill touching the rites and ceremonies of the Church had been read a third time, the Queen declared to the House, through the Speaker, that "No bills concerning religion shall be proposed or received into this House, unless the same be first considered and approved by the clergy." This, however, referred to the initiative of the legislature touching the internal affairs of the Church, and actually formed a new province, as to which no precedent could be found for the co-operation of Parliament. On the contrary, the interference of the Commons with the internal administration of the Church, as well as all taxation of spiritualities, had been always energetically rejected. According to the constitutional precedents of older times, Elizabeth's ordinances (*vide supra*, p. 138) can be proved to be constitutional. Never has any change in the customary civil or criminal law by means of ordinances been mooted. Many of them are based upon express authorization by previous statutes; others, again, upon their ecclesiastical power, such as the ordinance against the conventicles (prophesyings), and the decrees of the censorship of the press; others upon feudal and military prerogative, as the ordinance concerning the length of swords, the prohibition of the export of provisions to the enemy. Elizabeth, indeed, on principle, asserted her right to make laws in the new province of religious affairs, without the aid of Parliament; but at last, though with many assurances that it was unnecessary, she caused even the Thirty-nine Articles to be sanctioned by Parliament. (*a*)

(*a*) The parliamentary legislation was inaugurated by the Act of Parliament at the accession of Henry VII., declaring that the hereditary possession of the Crown of England shall be, stay, and remain in Henry and the heirs of his body. In the Pope's letter there was added, "*Nec non De-*

2. The right of *voting money supplies* is also undisputed. The seven Parliaments of Henry VII. and the first five Parliaments of Henry VIII. had the voting of subsidies for their chief object. After Henry VI. the tonnage and poundage had been granted to the King for his life, and the hereditary revenue so far strengthened as to allow of the current needs of the executive being more easily covered without subsidies. Moreover, the right of the estates of the realm to vote supplies had been for two whole centuries so firmly established that the first attempts at arbitrary power of Henry VII. and Henry VIII. conjured up a dangerous resistance. The Parliaments of Henry VIII. showed themselves in the main so compliant, that this King is said to have raised more subsidies than all his predecessors together. Prompted by the feeling that the King required great means for great objects, later on most extraordinary supplies were voted, though not indeed quite as much as Henry demanded. When Parliament did not directly grant more, it indirectly allowed an abuse of administrative power to be put in force against individuals, by so-called "benevolences," which were impressed upon capitalists by the council, by special commissioners, and by enforced service in the militia. This species of compulsory loans (with or without definite prospects of repayment), which was introduced under Edward IV., had been expressly disavowed under Richard III.; but the statute was not respected, as being a measure of an usurper, as was afterwards expressly explained by Cardinal Wolsey to the people of London.

creto Statuto et Ordinatione ipsuis Angliæ Regni trium Statutuum, in ipso conventu Parliamento nuncupato." The holding of Parliaments was, according to former custom, left to the discretion of the Crown; frequently it was suspended for a number of years. But, on the other hand, it became ever more frequently the custom to prorogue the sessions of the Parliament, when once convened, to the following year. Only with the Reformation Parliament did an inclination of both Houses arise to delegate to the King extraordinary powers and even legislation itself. The Reformation Parliament declared without scruple: "Your high Court of Parliament has full power and authority, not merely to dispense, but also to authorize a certain person or persons to dispense from these and all other human laws of this your Kingdom" (Amos on the Reformation, Parl., 65; *cf.* 25 Hen. VIII. c. 237). The far-reaching *Statute of Prerogative*, 31 Henry VIII. c. 8 (Froude, iii. 200), was, however, repealed on Edward VI.'s accession to the throne.

In 7 Henry VII., with the indirect sanction of Parliament, this abuse was revived, and from this time onward, it repeatedly recurred (particularly in the years 1495, 1505, 1525, and 1544). As early as the reign of Henry VII. Archbishop Morton had discovered the clever principle of taxation, which received the name of "Morton's Fork." He told those who lived handsomely, that their wealth was proved by their expenditure; and those who lived penuriously, that their parsimony must have made them rich. The attempt made in the year 1525 caused, however, a dangerous insurrection, to which Henry VIII. yielded. These forced loans never became effectual except through the direct or indirect sanction of Parliament. It was an intentionally tolerated abuse, the motive for which was the avoidance of a grant of subsidy. Elizabeth once refused a forced loan of this description, on its being offered by Parliament, and showed herself in all cases, when she of her own accord adopted them, conscientious with regard to repayment; on these occasions she sometimes gave the honour of knighthood and friendly words instead of interest. On one occasion she had imposed a duty upon sweet wine, on another she had raised a tax from the clergy without the consent of Convocation; but in principle the right of taxation remained during the whole of this period fully recognized. (*b*)

(*b*) The money grants of Parliament had become, with the decay of the hereditary revenue of the Crown, the principal reason for the dependence of the Crown upon the Lower House. To a certain extent the deficiency was made good by the tonnage and poundage for life, which was retained, as a rule, on the accession of the five monarchs of this dynasty. Henry VII. had thereby, and by his financial extortions, made himself far more independent of Parliament than his predecessors (Peers' Report, i. 372); in all the seven Parliaments of Henry VII. subsidies were, however, granted. Much more abundantly did the grants flow in under Henry VIII., and as a rule in the customary method, that the Commons grant "with the consent of the Lords," and the clergy in Convocation grants for itself, but its grants are confirmed by Parliament—a rule which was also repeated after the ecclesiastical restoration in 5 Mary. When, in 14 Henry VIII., Cardinal Wolsey appeared in great pomp, to move for a subsidy, he was obliged to accept the Speaker's answer, "that his coming thither was neither expedient nor agreeable to the ancient liberties of that House." A power on the part of the Lords to amend the money bill was recognized in so far as that in 1 Elizabeth the Lower House accepted an amendment of the Lords. In 27 Elizabeth the Commons grant two-fifteenths and two-tenths, but the Lords strike out one-tenth, with which emendation the grant passes. In spite

3. The *control of the administration* by Parliament was finally guaranteed by the right of voting supplies, and participation in the legislation. It was also at times exercised in national complaints touching financial and other administrative abuses, and, after the Reformation, by religious complaints in one direction or another. This activity was, however, from the first pre-eminently dependent upon conditions of power, the state of public opinion, and interests. As in the preceding century it had frequently exceeded all bounds, so now it frequently failed to enforce its just claims, though here will rather than power was lacking. As the Upper House in its condemnation of unpopular favourites, so the Lower House in furthering enforced loans and in punishing disrespectful opposition, sometimes showed itself more monarchical than the King himself. This overpowering influence of the social interests and opinions of the time has become intelligible by experience to the nineteenth century. Under the Tudors it had exactly reversed the meaning of parliamentary impeachments. Instead of guarding the constitution as a whole from violation, and preventing abuses of the executive power against individuals by its penal powers, the Parliaments had become so subservient in their penal functions that under Henry VIII. a dictatorially selfish wilfulness, under Edward VI. party-passions, and under Mary religious fanaticism had no surer mode of striking their opponents than by the resolutions of Parliament. The morality of the times scarcely considered the wrong to an individual as a public evil. The bloodthirsty violence of Henry VIII. was vented upon the immediate surroundings of the throne, upon a nobility he had himself raised up, which

of all economy, there were under Elizabeth in the course of 11 parliamentary sittings, 19 subsidies, and 38 fifteenths voted, and, in 44 Elizabeth, actually four subsidies and eight fifteenths on one single occasion. Even in the time of the greatest loyalty, the Speaker of the Lower House, Onslow (who was at the same time Solicitor-General), says, in an address to Elizabeth: "Our common law, although there be for the Prince provided many princely prerogatives and royalties, yet is not such as the prince can take money or other things, or do as he will at his own pleasure without order, but quietly to suffer his subjects to enjoy their own without wrongful oppression; wherein other princes by their liberty do take as pleaseth them."

condemned its own peers, well knowing that new gifts followed upon confiscations. But the mass of the people sought and found in the Tudors the furtherance of their interests by the administration, and the satisfaction of their national pride by the Reformation. And herein we must also notice that the debates of the House were not carried on in public, and, in consequence of the then existing censorial regulations, and the want of a periodical press, were but little known, and accordingly only found support outside the House when opposition allied itself with a strong and universal public opinion. But in all questions involving principles, as also in all material questions, such as taxes and monopolies, the opposition shows itself obstinate enough. The rule of the Tudors, out of regard to this state of things, treated the commoners after its own fashion. A good understanding with them, yet hand-in-hand with crying wrong done individuals, pervades the whole period. An incident which occurred in 44 Elizabeth is characteristic. The Queen, after a debate of six days, abolished a severe abuse, the grant of monopolies, in dignified and queenly language, and received the thanks of the House in return. (*c*)

The exercise of parliamentary privileges shows accordingly

(*c*) The control of the Government is, except in one point, scarcely different from that of former epochs. This is the disappearance of the impeachments of ministers of the Crown by the Lower House. The penal procedure of Parliament appears rather as a political measure for the removal of persons of high distinction in the form of an enactment. Its legal validity was modestly questioned by the justices in 31 Henry VIII., who held that it was a new and dangerous question; equity, justice, and law demanded that the accused be heard; as, however, Parliament was the highest tribunal in the land, from which there was no appeal, the validity of its judgments, of whatever kind they might be, could not be called in question.

But the reproach of compliant weakness is more applicable to the nobles than the commoners, and particularly to the old houses, the Norfolks, Arundels, Shrewsburys, quite as much as to the newly elevated Cromwells, Riches, Russells, Powlets, Pagets, etc. (Hallam, "Const. Hist.," i. c. 2). The political courage too of the higher clergy seems to have been buried with Thomas More and Fisher. The Upper House contains a nobility in a new position, which only in later generations regains its old feeling and character. Beside the servility of the Upper House, the Commons still betray symptoms of independent views. Their pompous and servile language belongs to the style of the time; their yielding temper on the occasion of forced loans (Stubbs, iii. 276, *seq.*) and their high-handed acts against individuals are a sign of the egoism of the times. Their submissiveness in religious questions is a national sympathy for the national Church.

in this period many sides, which would appear inexplicable unless due regard were paid to the religious controversies and to the character of this society that was in a process of reconstruction. But the parliamentary constitution existed, and there was on the part of the Tudors neither a serious intention of abolishing it, nor on the part of their Parliaments an idea of permanently renouncing any portion of it. The notion that the Tudor form of government was in principle an absolute one has been in modern times principally propagated by Hume's partial history, and is now acknowledged to be erroneous. The attitude of the Tudors towards the personal rights (liberties) of members of Parliament is a characteristic incident, and helpful to the comprehension of the parliamentary constitution. In 4 Henry VII. the error for the first time occurred that a local court passed a penal sentence upon Strode, a member of the Lower House, on account of bills which he had introduced. Upon motion of the Commons, the unanimous declaration of both Houses and the King ("Statutes of the Realm," iii. p. 53) was issued, which declared that judicial proceeding null and void (May, "Parl. Practice," i. c. 4). In 35 Henry VIII. the first case occurs in which the House summons the sheriffs of London before its bar for arresting a member, and commits them to prison, which proceeding was confirmed in the most emphatic manner by the King (Hatsell, "Precedents," i. p. 53). Similarly, in 35 Henry VIII., the privilege of the House was acknowledged in the face of an order of arrest issued by the council (Nicolas, "Proceedings," vii. 306). In 2 Mary an indictment was attempted in the King's Bench of those members who had, in consequence of the proceedings touching the question of religion, quitted the House without permission; but this case never came to an issue ("Parl. Hist.," iii. 312–335). The attempt to exclude a member of the Lower House from the sittings by royal order (1571) was given up. The issue of these conflicts resulted finally in favour of the Lower House.

CHAPTER XXXIII.

The Reformation.*

Now that a generation had passed away since the Wars of the Roses, and a new one had grown up under the orderly discipline of the State, the time at last drew nigh for resuming the work of ecclesiastical reform, which had been interrupted in the fifteenth century.

It is difficult for us to realize that period of the Middle Ages in which the Church is the representative at once of politics, legal knowledge, diplomacy, education, literature, and much more besides; a period in which the clergy were not only father confessors, but belonged to the State as chancellors, treasurers, ambassadors, justices, clerks of the court, barristers, attornies, physicians, accountants, and secretaries; and as such, therefore combined in one great class, rendered exclusive by celibacy, the whole of the rights which

* For the history of the Reformation, the one-sided but authentic "History of the Reformation," by Burnet (1681, 3 vols. fol.), is still of the greatest value. In modern times: Vaughan, "Revolutions in English History," ii., "Revolutions in Religion" (1861); A. Amos, "Observations on the Statutes of the Reformation Parliament in the Reign of King Henry VIII." (London, 1859). Among the numerous modern supplementary works may be especially mentioned: J. Galt, "Life of Cardinal Wolsey" (1846). For the times of the Puritans: Samuel Hopkins, "The Puritans in the Church, Court, and Parliament during the reigns of Edward VI. and Elizabeth" (New York, 1859); J. B. Marsden, "The History of the Early Puritans," and "The History of the Later Puritans." But above all, J. A. Froude, "History of England from the Fall of Wolsey to the Defeat of the Spanish Armada," vols. i.–xii., hereafter quoted from the edition of 1870–1877. Out of the copious matter contained in the latter work I may here especially draw attention to the proceedings against Queen Anne Boleyn, vol. ii. c. 2. and App.; the characteristics of Henry VIII., vol. iv. c. 24; the action against Mary Stuart, vol. xii. c. 69.

resided in all branches of intellectual labour, whether official or not. From this fusion of the intellectual and moral life of the nations into one institution arose property, magisterial control, and the power of the Church, and it grew up into that universal State of the Middle Ages, which attained the outward zenith of its power at the commencement of the preceding period. Since then a state of tension had by degrees come about, in which the Church had, to the bulk of the people, become a mere outward institution, and to the upper classes in many respects an object of aversion, and in which the old rights of the Church had already become jealously regarded privileges. The beautiful office of mediator, which in the Anglo-Norman period, and in the great crisis of Magna Charta, had been undertaken by the English prelates, had all but passed out of mind. The high ecclesiastics had been for a long time past no longer mediators, but rival candidates for political power. In the Wars of the Roses they had proved themselves to be a body devoid of moral influence. After ecclesiastical property had, by the Church's own fault, been diverted from its original purpose, the Church still claimed (though now with inadequate means) the fulfilment of the humanitarian duties of the State as her own monopoly; whereas the laity had now the judgment, the will, and the means of fulfilling such duties itself. After the causes had gradually disappeared which had induced the clergy to emancipate themselves from the magisterial power of the laity, so as not to degenerate into the disunion and barbarity of the feudal state, the Church insisted with all the more zeal upon her exemption, as being a class right and privilege; and this, owing to the over-indulgence of the spiritual courts, led, in the shape of "benefit of clergy," to the exemption from punishment of ecclesiastics, even for notorious crimes and immoral conduct. Now that the close of the Middle Ages had opened to the European populations new domains both in the physical and in the intellectual world, now that the thoughtful spirits of the age had become involved in a movement such as had been hitherto unheard of, the Church

demanded that intellectual life should stand still, because her leading functionaries could not and would not keep pace with its progress. Although her intellectual and moral foundations had been shaken to their lowest depths, the Church still remained in possession of all the estates and rights of power which ever remain for some time in a human community after the moral justification for their possession has disappeared. This is that eternal contradiction out of which the great reformatory tasks of the State proceed. This contradiction now took possession of the whole of the Catholic world, and, by the complete alienation of the Roman Church, implicated the papal chair in the network of intrigues and struggles of the European great powers, abolished the former solidarity of Catholicism against the propagation of heresies, and thus everywhere opened a freer scope for the aims of Reformation.

In these struggles of the Reformation a dual movement is to be distinguished. The first is the fight made by liberty of thought and conscience against the Roman intellectual tyranny, a fight waged by certain bold thinkers and a small portion of the clergy and laity, who are urged on by the deep conviction, gathered from the Holy Scriptures, that essential portions of the Roman Catholic dogmas and doctrines were the work of man, and inventions for enhancing ecclesiastical supremacy. The second movement is the striving after national independence against the Italian suzerain, and this is supported by the great majority of the people. This second tendency is, in England, by far the preponderating one. After the classes of society were united in the Upper and Lower Houses under the Plantagenets, after the nation had learnt to feel itself a unity, the insular popular aversion to the Roman primate also returned. It is at first the sense of national exclusiveness and independence which revolts against the universal ecclesiastical State. Whilst the German Reformation is primarily the outcome of an intellectual movement, and of the deep conviction of the errors of Catholic doctrines, and only in a secondary manner reflects upon the State; the English is at its very outset a national political act which

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only after the lapse of generations deepens into an intellectual movement among the mass of the people. It is, therefore, at its outset "more practical," that is, "more external." As the Roman Church had become secularized in fixedness of property and political institutions, so also it was attacked upon this external ground, in its possessions and in its suzerain; the casting off of the suzerainty of the Roman bishop is the first aim.

Henry VIII. had been personally trained up in Catholic doctrines. He had in person taken part in the dogmatic controversy of the times, by his treatise against Luther earned the honorary title of "Defender of the Faith," and had even himself zealously caused the persecution of heretics; but yet in the coronation oath, touching the constitution of the Church, he had with his own hand made the correction: "*nott prejudiceall to hys jurisdyction and dignity royall*" (Ellis's letters). In the part he took in European intrigues he had always dealt with the papal *curia* upon the same terms as with other great powers, and had gained sufficient experience of its friendship and enmity not to over- or under-estimate it. But his divorce proceedings had brought him into complications out of which there was at last no other way of escape than by breaking with the external authority of the Bishop of Rome. In this state of affairs the King could not rely upon the doctrines of individual reformers, but only upon the great tide of national opinion, upon the insufficiently educated but influential parochial clergy, and upon the mass of the people. Their sympathies everywhere accorded with his political tendencies and his personal wishes, and afforded him a support similar to that which in former times the House of Commons had afforded to the Plantagenets against the barons. Yet even with these sympathies in his favour the revolt against the universal power of the Church was still a daring step. It was the renouncing of obedience to the highest legitimate power, a breaking with the whole system of authority of the Middle Ages. But the boldness and acumen with which Henry VIII. carried out the scheme upon which he had resolved, gives his ruthless and violent personality a providential significance for England.

Whilst it disclaimed all connection with the Lutheran and reformed doctrines of the Continent, the new legislation was ushered in by universally popular measures, by the abolition of ecclesiastical dues and some administrative abuses.**

The first decisive step is the complete separation and emancipation of the ecclesiastical bureaucracy from Rome, a re-enforcement of the "*præmunire*," and strict prohibition of every appeal to the *curia*, "in consideration that the Kings of England have never had any other superior but God alone." The papal right of dispensation was transferred to the primate, the sale of indulgences forbidden, papal indulgences declared null and void, the grant of the pallium freed from all influence of the *curia*, every doctor of Roman law, be he cleric or layman, declared capable of exercising the magisterial rights of the Church (as vicar-general, chancellor, or justice). The King again exclusively assumes the right of appointing the bishops. The whole body of the clergy is immediately subjected to the civil jurisdiction and to all the coercive measures of the executive.

The second decisive step is the secularization of the ecclesiastical property by dissolution of the monasteries. They were until then in alleged possession of one-fifth of the land in the realm, and possessed a revenue about three times as large as the ordinary receipts of the Crown, an income very unequally distributed amongst from four hundred to five hundred institutions. The idleness, licentiousness, and immorality of the monks were notorious, yet the King considered a formal agitation necessary to reconcile the nation to this violent attack upon the existing legal estates. The Crown acquired by this means £500,000 personal property, and at least £131,000 annual rents from real estate; according to other estimates, three, four, or even ten times as much. This mass of wealth was partly expended for immediate war purposes, partly granted to the nobles and gentry with royal profuseness, partly parcelled out on State account, partly employed for the fortification of the country and for improvements, and

** As to the epochs of the Reformation, *cf.* the excursus at the end of the Chapter.

for the endowment of new bishoprics. Thus were the estates of the noblest families in the land at once made dependent upon the legality of the Reformation, and the former majority of the spiritual peers in the Upper House was changed into a minority by the deposition of the abbots and priors.

Partly simultaneously and partly subsequently there were added to these concrete measures, which were directed against the external ecclesiastical state, the comprehensive and formal declaration of the "royal supremacy." In 25 Henry VIII. it had already been declared that Convocation should issue no new canons without the royal consent, nor execute such without the royal *placet*. By the formal declaration of supremacy, however, the King now, as successor to the papal power, takes up the ground of divine appointment with equal legitimacy, and with it continues the ecclesiastical constitution as it had hitherto existed, as well as its legal protection by capital punishments for *hæresis*, *apostasia*, *schisma*, as a portion of the royal prerogative. After a single attempt at applying to the denial of supremacy the punishments inflicted in the Middle Ages upon heretics, Henry VIII. does not scruple to apply the capital punishments for high treason to the violation of these new prerogatives of the monarchy.

Up to this point the Reformation had only been external, without any separation from the Roman *dogma*. This is the very point at which the external character of the movement appears most outrageous. Whilst Henry revolutionized ecclesiastical property and constitution, dogma is only incidentally mentioned. Parliament had certainly empowered him to appoint a commission "to agree upon a new form of the national religion." But the work was only begun in a hesitating and vacillating way, and it was hardly known how to set up any new matter. Gardiner's Six Articles still teach the doctrine of transubstantiation, refuse the cup to the laity, retain auricular confession, Masses for the dead, and celibacy, and confine the reading of the Bible to persons of rank. Whilst on the Continent streams of blood flowed on account of the creeds of the Church, political negotiations are here

begun for the adaptation of a "national" doctrine of faith, in the course of which Henry dies.

What was most unintelligible to the Continent, and was at times an object of aversion, was the manner of carrying out this royal reformation. It was not so much the rule of passion or caprice of a despot, but it was Richelieu's system anticipated, which, in accordance with a well-considered State plan, always crushed the head of opposition at once, in order to prevent "contagion." In the first stage of the Reformation, after formal proceedings and deliberations in the Privy Council, it was determined to hang the prior and three monks of the Charterhouse in their canonicals, *coram populo;* and the clergy at once submitted. In a second stage the executioner's axe again falls on the heads of the opposition (the Chancellor Thomas More and Bishop Fisher). In the later stages, from time to time, single executions in special provincial places are determined on. The execution also of two queens, which was indirectly connected with the Reformation, took place with the strict ceremony of a judicial trial and judgment. It is in like manner State policy which sacrificed the most faithful and most successful servant of the King, Lord Thomas Cromwell, to the passionate hatred of the high clergy and magnates. State policy actually succeeded in localizing the civil wars which followed the Reformation, and in easily suppressing them, though at the expense of violating the highest principles of Christian morality, for which retribution follows.

The Reformation was only fully carried out by the regency under the name of Edward VI., as well in dogma as in Church ceremonies and the liturgy, in the abolition of celibacy, and in the general licence to read the Bible. This Protestant reform was the work of Cranmer and other men of true religious convictions. But the opinion of the nation was still divided. The religious confusion caused party spirit and dissatisfaction, distress and social differences throughout the country, with which the regent, the Duke of Somerset, was not strong enough to cope. Once more, with the govern-

ment of a protector, the rule of the nobles revived, which pressed with heavy hand upon *villeins* and the labouring classes, and which, amid famine and pestilence, financial distress and debasing of the coinage, squandered the resources of the State, and raised the expenditure of the Court from £14,000 to £100,000, dissipating Crown lands to the value of £1,500,000 in the form of grants of favours, sales, and exchanges to the enrichment of the ministers and their friends. In this position the weak regency succumbed to the ambitious intrigues of the Duke of Northumberland, who, in the confusion of the times, even endeavoured to secure the succession to the throne in favour of his family.

Seldom has any reformation been apparently more quickly suppressed than this English Reformation under the Catholic Mary. Once again it is State policy to which the higher intentions of the Ecclesiastical Reformation are sacrificed. It was not merely the popularity of the legitimate daughter of Henry VIII. which gained the rapid victory over the rival Queen, Jane Grey, but it was the threatened danger of a return of dynastic struggles, which rendered both Parliament and nation subservient to the will of the Catholic monarch and ready to sacrifice all else to the temporal interests. The abolition of the royal supremacy, the re-introduction of celibacy and the Mass, passed easily through Parliament; indeed, through the Upper House without any opposition. One thousand five hundred (according to others, 3000) clergymen were driven out of their places; 284 persons were burnt, among them Archbishop Cranmer, four bishops, eight gentlemen, sixty women and children. Mary might have made any demands but one—the restitution of the ecclesiastical estates.

The reign of "bloody Mary" is, however, only a short interruption of the Tudor system. In her successor, Elizabeth, the glory of the English monarchy becomes once more concentrated. The true nature of the Roman Church had displayed itself to the nation in its most repulsive form. Chastened by severe trials, strengthened by faith, enlightened by examination of the Holy Scriptures (now no longer closed

to the people), the Protestant religion now strikes its root firmly into the hearts of the people, attains by a careful revision of the Prayer-book, the Liturgy, and the ritual, a form sympathetic and intelligible to the great majority of the English people, and thus renders possible the re-establishment of a united Church in a united nation. By the Act of Supremacy (1 Elizabeth, c. 1) and the Act of Uniformity (1 Elizabeth, c. 3), Elizabeth, as ruler of the Church, declares the Protestant Church to be the State Church "as by law established;" and the whole population as lawfully belonging to the State Church. Every cleric, every Englishman in any public office, and on entering the House of Commons, has to take the Oath of Supremacy. The Thirty-Nine Articles were also subsequently confirmed by Parliament. The later statutes of Elizabeth appear only as supplementary to these—5 Elizabeth, c. 1, for assurance of the Queen's royal power, all estates and subjects; 13 Elizabeth, c. 1, against bulls from Rome; 13 Elizabeth, c. 12, for ministers of the Church to be of sound religion; 23 Elizabeth, c. 1, against Mass; 27 Elizabeth, c. 2, for the departure of Jesuits and priests; 35 Elizabeth, c. 1, against sectaries; 35 Elizabeth, c. 2, against popish recusants. Thus has the English State Church become established, independently opposed to the Roman Ecclesiastical State, subordinate to both King and Parliament, and incorporated into the civil community. The royal supremacy has become a necessary presupposition of the present political system, with all its consequences for the external life. Not until this Act has been passed do we find the monarchy upon the pinnacle of its power under the long and glorious reign of the Virgin Queen.

NOTE TO CHAPTER XXXIII.—**The Epochs of the Reformation** may be divided in the following manner:—

1. The national Church of Henry VIII. appears as a continuation of the external policy of the first twenty years of his reign. Henry had by predilection and with tolerable success mixed in the complications of the European cabinets of his time. He had found for such purposes, in Cardinal Wolsey, a versatile minister, who was a match for the statesmen of the Continent, and perhaps more than their equal in duplicity. But the proceedings relating to the royal divorce had become at last irretrievably entangled in the dynastic and political complications of the Continent, as the King acknowledges after his own fashion by abandoning

Wolsey. Immediately after the overthrow of his master, and with the latter's consent, a hitherto subordinate servant of Wolsey begged and obtained an audience of the King. The object was doubtless the suggestion that the King might save his honour and his independence by assigning his matrimonial question to the authorities within his own realm, by renouncing the supremacy of the Bishop of Rome, and by a reassumption of the royal powers almost to the extent in which they had existed down to Magna Charta; in fulfilment also of the national wishes and aims of the Commons, as they had been plainly enough declared in the fourteenth and fifteenth centuries. The modest, clever, and determined councillor, for the realization of such plans, appears after a few months in the King's council, after a few years as Lord Thomas Cromwell (ultimately Earl of Essex), at the head of the Government, as the author and leader of the connected chain of parliamentary statutes, ordinances, and measures. The so-called Reformation Parliament, which was convened to carry out this plan, was, with many prorogations, in constant activity for the compassing of this object from November, 1529, to April, 1536. With great skill the initiative was taken by an address of the Commons, in which on the one side complaint was made of the increase of heretical teaching ("frantic and seditious books contrary to the true Catholic faith"), and on the other side the notorious weaknesses of the Church appear as a long list of national grievances with the strongly prominent accusation "that such ecclesiastical laws and measures attack your Majesty's prerogative and do your faithful subjects grievous wrong." The defence of the Church against this was difficult, and was conducted in an exceedingly weak manner, with the excuse that "if certain of the Church's members should unhappily so far go astray, that cannot be said of all." The indictment, charge, and the defence of the bishops are given in Froude, vol. i. chap. 3. It is characteristic that the senile prelacy in this situation thought to strengthen the respect for the Church by the burning of certain heretics. It was only when the new laws began to become more incisive that the prelates found their spokesman in Bishop Fisher, then seventy-six years of age. In the Upper House (to which forty-four temporal and forty-six spiritual peers had been summoned) no serious opposition was manifested. In the feeling that the Court, the Commons, and the mass of the laity were all against them, the Lords agreed to one measure after another. The successive order of them in detail belongs to parliamentary history; they have been grouped above as nearly as possible according to the connection in which they proceed from a well-considered plan. Only on the first declaration of the royal supremacy both Houses of Convocation timidly sought to make the reservation "sole and supreme head of the Church, as far as is allowed by the law of Christ." By the declaration of supremacy the national Church comes into an irreconcilable opposition to the Roman Catholic, yet still with the express reservation that there was therein no intention of swerving from the "community of the Christian Church in any articles of the Catholic faith of Christianity, or in any other things which have been declared by the Holy Scriptures and the Word of God as necessary to salvation." The internal contradiction of such a proceeding was sure to make itself immediately felt. Henry VIII. was aware that with ecclesiastical Rome no such compromises could be made as with diplomatic Rome. He saw himself confronted by a system which must either be absolute and sovereign or else could not exist. The choice was only left him between being the conqueror or the conquered. He would not suffer any doubts to arise as to his decision on this point. In order to suppress by force the opposition to his supremacy in the highest of his functionaries, he allowed the new laws to take their bloody course against his chancellor, Thomas More, and against Bishop Fisher. On the other side, the question of dogma became for him precisely a question of honour and character. The conformist Catholic powers of Europe, as representatives of established authority and legitimacy, were leagued and banded in opposition against the nonconformist and Protes-

tant powers. Should Henry, turning his back upon his education, his convictions, his participation in theological controversy, and his whole past career, join the dissenting party? Shortly before the dissolution of the monasteries, and in a difficult state of external affairs, he had, indeed, by ten articles touching the doctrines of the Sacraments taken steps towards an approach to the Augsburg Confession. But a definite renunciation of the old dogma was a moral impossibility for Henry VIII. And the great majority of the population also showed itself passive in questions of faith. An individual does not change his faith in days or months, and fortunately nations still less; changes in religion have their origin in the deep convictions of single men, who, tested by hard trials, gain a convincing power over others: these changes proceed, accordingly, from minorities. Henry VIII. was desirous in another direction to allow no doubts as to the limits of his system. He accordingly let penal justice take its course, by the burning of a number of heretics on account of their Catholic heresies; he did not even scruple to sacrifice his upright and faithful servant Cromwell to the deadly enmity of the aristocracy and of orthodoxy. From this vacillating state of affairs those six articles of Gardiner arose, which teach the Real Presence of the flesh and blood of Christ "in the form, but not in the substance" of the bread and wine, and retain the private Mass, celibacy, and vow of chastity. "In Henry VIII. no free self-devotion, no loftiness of soul, and no real sympathy for any living man can be discerned; they are all in his eyes nothing but instruments, which he first uses and then breaks. But he has an unrivalled practical intelligence, and an energetic activity that is employed in the general interests; he combines a fickleness of purpose with a constant firmness of will. One follows the course of his reign with a mixture of abhorrence and admiration" (Ranke, "Engl. Gesch.," i. 224). Only too apposite is the parallel to Richelieu which I have drawn above. A Reformation so politic as this could certainly not exempt the English nation from the serious and severe struggle for the Christian truths, but could only postpone the issue of the conflict to later generations. A system of this description could only close with half measures, viz. 32 Henry VIII. c. 26, 34 Henry VIII. c. 1, such as were quickly abolished in the succeeding reign—an illustration of the eternal truth that no man should dare attempt to become a reformer in ecclesiastical matters without having a deep and hearty conviction himself.

2. The dogmatic Reformation under Edward VI. endeavoured to provide the kernel that was lacking. Its spiritual originators are Ridley and more especially Archbishop Cranmer, whose character, in spite of a yielding clemency, leaves no doubts in the mind as to his truthfulness and his desire to do right, and to whom it was also vouchsafed to seal the truth of his convictions by his death. The same disposition lies in the Protector Somerset, and in the youthful King himself. As an outcome of real personal conviction, the Protestant doctrines of justification by faith, of moral self-guidance, and self-responsibility which can attain internal peace by individual actions, without the need of the mediating services of the priest, now assert themselves. The Common Prayer-book has become the imperishable monument both of the national temperament and of the religious feelings of the time. The doctrines of distinction in the sacraments, the abolition of the confessional and celibacy, and the reform of the ceremonial and Liturgy are completed with the forty-two articles. But it could not be helped that, in the eyes of the majority of the people, it was more a change of government than a change in religion that had taken place. Innovations in the services of the Church and in the Liturgy are at all times unpopular. The masses had learnt other rules of faith, many felt anxious in their consciences, others again felt themselves impelled to a more extensive agitation; among the wealthy classes the interest of a new acquisition still struggled with political scruples against the innovations. This confusion of minds clashed with severe social difficulties, which required a firm guiding hand. In a time in which monarchical despotism was more than ever necessary, a weak regent stood at

the helm of the State, whose inclination for a personal government was in contrast with his capacity. The Protector Duke of Somerset, the uncle of the King, had rid himself of the regency council, which Henry VIII. had instituted by his last will, without possessing the capacity of exercising dictatorial powers as the successor of such an absolute ruler. The unsuccessfully conducted foreign affairs are complicated by the still more difficult internal ones. A frivolous aristocratic *régime* again returns, which embitters the country people by the confiscation of the common lands in favour of the lord of the manor, by diverse acts of oppression towards copyholders, tenants, and the labouring classes, combined with famine and pestilence. To these is added the inexcusable confiscation of the property of the hospitals and guilds, the seizure of considerable lands belonging to the episcopal sees, as well as the embezzlement of the great mass of Crown lands of the value of £1,500,000, which, in the form of grants, alienations, and exchanges, remained to the extent of at least one-third in the clutches of the "friends" of the ministers (Froude, v. 128). Once again the work of Reformation clashes with the secular interests of the State in a manner that was fatal to both parties. Thus, in an unfortunate hour, the intrigues of a party government by nobles return. The selfish upstart Northumberland, in his restless ambition, brings the Protector to the scaffold and seizes the reins of government, with the ulterior design of bringing the succession into his own family.

3. The Catholic Restoration under Mary is explained by the political situation. Upon the youthful rival Queen, Jane Grey, "the nine days' Queen," was fastened the capital crime of her father-in-law. The remembrance of the aristocratic harshness towards the poorer population had estranged all hearts from Northumberland. No one trusted this man. In the heartless, selfish regency council at the death of Edward VI., there was, indeed, no man, no family, and no party which enjoyed the public confidence. The well-founded feeling of the necessity of a monarchical rule turned accordingly almost unanimously to the legitimate heiress of the throne, the daughter of Henry VIII., already sorely tried by fortune. The religious opinions had not as yet become cleared. The newly constituted Parliament consisted of about one-third of Protestant members, together with almost two-thirds who were supporters of a "national Church," which was inclined to treat the dogmas of faith as open questions. The supporters of the papal ecclesiastical government form still a diminishing fraction. But the majority, considering only the exigencies of the times, sacrificed the reformatory legislation of Edward VI. in such a frivolous manner that the steadily Romanizing tendency gained the upper hand as early as in Mary's second Parliament, to which the sheriffs were expressly ordered to send men of the "wise, grave, and Catholic sort." This honourable assembly joined with the Lords in a supplication, which in deep sorrow for the past proceedings, repeals the Acts of Parliament against the Pope "under the condition that he will confirm their acquisitions of abbey and foundation lands." At this price these wise men allow the Queen and her fanatical counsellors full liberty in the burning of the primate and the chiefs of Protestantism. From time to time the unhappy woman upon the throne believed that by the acceptable sacrifice of heretic-burnings she would see her hopes of the birth of a successor realized. The third "Reconciliation Parliament" displayed the debasing spectacle of Lords and Commons falling down upon their knees, confessing in all humility the sins of their apostasy, and receiving complete spiritual absolution at the hands of Cardinal Pole,—reserving the possession of the ecclesiastical estates. Thus did the political party of the national Church make a retrograde movement from Protestantism to popery, and at the same time ruined itself in the estimation of the nation. Still more exactly characterized indeed was the nature of the Catholic counter-reformation and its leaders in England; "*Solam Romam quæritis, sola Roma destruet vos*," as Glanvill had once upon a time exclaimed to the canons of Canterbury. But for the English Protestant Church the burning of bishops and of women and children,

accompanied by the horrible scenes of a Spanish Inquisition, was a time of internal purification which under "bloody Mary" for the first time established the English Church in the hearts of the people.

4. The Anglican State Church of Elizabeth is the fusion of the external and internal sides of the Reformation. In sincere conviction and in the clear comprehension of her royal vocation, she restores the royal supremacy of her father and her brother's work of reformation, combined in one great act. The decided step of the Queen is followed at once by the sanction of Parliament in the Act of Supremacy and Uniformity, 1 Elizabeth, c. 1, 2. In the Upper House now only nine secular peers with nine bishops vote against the Common Prayer-book; of 9400 clergymen in England only 189 were compelled by this Reformation to lay down their livings. In real conviction, the Roman Catholic faith still lived on in a continuously diminishing minority. The bearing of the people is now entirely different from that under Edward VI. The worldly idea of a Church which should politically separate itself from Catholic Christendom, and yet should remain Catholic in its faith, has completely disappeared! The distinguishing doctrines, the discarding of celibacy and the confessional, the fundamental doctrine of justification by faith, are not conventional forms of belief which have been learnt by heart, but they are in harmony with the manly character of this people. On that very account they mostly follow the doctrines of Luther and Melancthon, but in sober dogmatism sometimes resemble more those of Zwingli and Calvin, with a comparatively small admixture of the ecclesiastical doctrines of Augustine. They reject the caste-system of the mediæval Church, and resolutely subordinate the Church in its outward existence to the executive, rejecting all foreign control on earth from beyond the four seas. The Anglican Church is no longer a political system, but an honest Protestant faith, which constitutes itself as a Church, in the fixed intent to act rightly and in a Christian spirit. Under severe trials the victorious power of religious conviction has asserted itself in the face of every diplomatic policy. And thus is the position of the Church henceforth fixed with regard to the Protestantism of the Continent, with which Elizabeth and her statesmen openly, loyally, and steadfastly enter into an alliance. All the essential points of the Anglican Church have been completed in the first year of Elizabeth's reign. Her later laws are only supplementary, establishing and strengthening it against the antagonists who assailed her from opposite sides.

CHAPTER XXXIV.

The Court of High Commission and the Administrative Organization of the State Church.

The administrative system of the State Church was developed from these events in consistent legal continuity. The Church had grown up as the school of the people; both for State and people there existed only one ruling Church—one Church proclaiming the Word of God, organized in an established bureaucratic form. According to the views the nations had held for a thousand years, there was on that very account only one Church. And this view was based upon the good reason, that the rights of marriage and kinship, the law of inheritance and all moral family relations from the cradle to the grave, the public instruction in all grades, and the intellectual life of the nation, and all institutions which serve the civilizing and humanitarian purposes of the commonwealth had been for centuries so closely interwoven with the legislation, administration, and judicial system of the Church, that there was no room possibly for two Churches in one political system. According to the spirit of the times, religious ideas could not be mere spiritual ideals. In the same degree in which the Roman Catholic Church had become external, the State Church also, which had become severed from it, could only find its support in real estate, in ecclesiastical authority, and in the person of the King. The existence of the great creation of the times and the nation, the possession of many thousand livings and of newly acquired

property upon secularized soil, now stood and fell with the ensuing political institutions.

I. For supreme Church government the high spiritual court, **Court of High Commission**, was established. The right to this organization had been already in principle recognized by Parliament under Henry VIII. viz. "to visit, repress, redress, reform, order, correct, restrain, and amend all errors, heresies, abuses, contempts, and enormities which fall under any spiritual authority or jurisdiction." Henry VIII. had sagaciously placed the first organization in the hands of one man, his vicar-general. Under Edward VI. a general visitation by mixed commissions after the manner of the six circuits of the secular jurisdiction had been arranged. Elizabeth, by giving to her supreme court a corporate form, was the first to endow it with a definite character, and though it was still separated for the two great ecclesiastical provinces, yet in both it remained an attribute of the royal sovereignty. "All such jurisdictions and privileges, as were formerly exercised by a spiritual or ecclesiastical power for the visitation or correction of the Church, shall be for ever combined and bound up with the sovereign Crown of this realm" (1 Eliz. c. 1 sec. 16 *seq.*). Whilst the Church attributed to the bishops and their primate a divine appointment, she had declared these powers independent of every other will and influence of any estate. In this complete sense, the government of the Church could now be seen to have passed from the Pope to the King, and these powers, restricted to the "carrying out of the Reformation," had been at first delegated by Henry VIII. to his vicar-general. After this had been completed, it appeared necessary, according to the system of the Church of the Middle Ages, to delegate the supreme jurisdiction and supervision to a bench-court. By the Act of Supremacy the Queen was empowered to form a "Court of High Commission" of this sort, with officers, who were revocably appointed by patent, exercising concurrent jurisdiction with the Privy Council in temporal matters. Its constitution is what is in Germany known as the *Consistorial-*

verfassung, which by the formation of courts composed of legal, administrative, and spiritual members, maintains the connection between the secular and clerical rule; in England it henceforward forms of bishops, members of the Privy Council, and other secular officials, the central department of ecclesiastical government. The immediate declared object of the first commission of 1559 was a "general visitation of all churches," with the right of suspending, depriving, and punishing clergymen. Pensions were granted to those persons who voluntarily resigned. The clergy who were dispossessed of their livings under Mary were to be reinstated; and all who had been imprisoned on account of religion set free after a summary investigation. Thus far the new arrangement had become necessary, in consequence of the confusion which had taken place under Mary. But the Court of High Commission obtained also the power of proceeding by inquisition, as was customary (that is, without a jury), to interfere in cases of heresy, errors, abuses, and anomalies in ecclesiastical matters, and to inflict fines and imprisonment. The constitution of the court was a comparatively fluctuating one. At its zenith (1583) it consisted of forty-four commissioners, among whom were twelve bishops, and a still greater number of privy councillors, besides other clerics and laymen. "It shall from time to time by a jury or by witnesses and other means examine into all infractions of and offences against the acts of uniformity and supremacy and two other acts; as well as inquire into all heretical opinions, seditious books, disobedience, conspiracies, false rumours, slanderous words, etc., against the said laws." Three commissioners (one of whom must be a bishop) are empowered to punish all persons who do not attend the church in compliance with the Act of Uniformity: to examine and reform heresies and ecclesiastical dissensions: to dispossess of their livings all such persons as assert doctrines contrary to the Thirty-Nine Articles: to punish fornication: to examine on oath all suspicious persons: to punish the disobedient by penance, fines, and imprisonment: to alter

the statutes of colleges, schools, and foundations, and to demand the oath of supremacy. (1)

But in addition to this spiritual privy council, the corporate constitution of the Church of the Middle Ages upon the whole was continued from the old into the new Church. In both Houses of Convocation the periodical association of the prelates with the parochial clergy still continues in the old form. It was retained as being the constitutional form of taxing the clergy. By the side of, and subordinated to, the Court of High Commission there existed here also a synodal system, in which the bishops with representatives of the chapter and delegates of the parochial clergy form a parliamentary body, which in subordination to the national government and the national legislation exercises a *jus statuendi* and a right of voting supplies, in permanent connection with the Upper House of Parliament, through the bishops who take their seats in both Parliaments. The common existence and common work under this constitution gave the clergy, which was (even under Elizabeth) wavering in dogma and ceremonial between two extremes, a steady tendency and a general consciousness of the nature and the right of the Anglican Church. The necessity of the royal consent to their convocation and to their decrees, and still more the official position of the bishops, maintains their subordination to the executive. Convocation in its later development became certainly a dangerous instru-

(1) As to the Court of High Commission, *cf.* Burnet, "History of the Reformation," ii. 358; Reeve, "History of the English Law," v. 216–218. As in the Star Chamber, so in this court, a purely official procedure prevailed, that is, the inquisitorial procedure in form and spirit. In England also the truth is manifest, that in a pure official body and for the discipline of an official staff, this fundamental form is the proper one. Some scruples are certainly shown by the temporal courts of law as to the constitutional character of such an institution, and complaints are raised against the inquisitorial nature of the oath (oath *ex officio*) later introduced into it. But the prevailing opinion of the times nevertheless regarded the Court of High Commission as a necessary consequence of the Reformation. The opposition of Leicester, Burleigh, and other of Elizabeth's councillors was probably the outcome of the jealousy of the temporal and spiritual statesmen of the time. The court in its corporate capacity did not exercise more than the constitutional powers, which had been from all time allowed the ecclesiastical government, and the degree of rigour that it practised for the carrying out of the work of reformation, was for a long time necessary and therefore popular.

ment for the re-awakening a spirit of caste among the clergy. In the period of the Tudors this danger was, however, not very palpable, so long as the appointment and management of the court were conducted with a view to moderating that tendency.

II. **The diocesan government** of the Anglican Church remains unchanged in its essential features. In this intermediate degree of the ecclesiastical rule, the Reformation does not show itself so much in altered forms as in the changed spirit of the officials. The archbishops and bishops retain the customary powers of ecclesiastical control and of jurisdiction within their dioceses, but are subordinated to the King both as to appointment and continuance in office (31 Henry VIII. c. 9, and special statutes). So soon as a bishop's see becomes vacant, the King grants the Dean and Chapter a *congé d'élire*, with a letter in which the name of the person to be elected is contained. If the election be delayed for twelve days, the King appoints directly by letters patent. Cranmer and certain bishops had even under Henry VIII. accepted an appointment *durante bene placito*. On Edward VI.'s accession the bishops were compelled, in the same way as other administrative officers, to obtain new commissions, by virtue of which they held their offices revocably "as delegates of the King, in his name, and under his authority." Elizabeth, after some interruption, restored this relationship, and asserted a personal right to suspend and dismiss the prelates. Such a bureaucracy lacked, of course, the social independence of the Roman Catholic prelacy. The standing armies and fortressed towns of the ecclesiastical state had all disappeared with the monks and monasteries; the power of their material possessions was weakened by secularization, and all offices which were important for the political position of the Church were subordinated to the monarchy. Together with the bishopric the whole ecclesiastical bureaucracy was made primarily subservient to the royal primate. (2)

(2) In the bishops' dioceses a change was made by the six new bishoprics which Henry had founded from the monasterial lands, viz. Gloucester, Bristol, Peterborough, and Oxford, which belonged to the province of

III. *The position of the lowest grade of the ecclesiastical local offices,* **Rectories and Vicarages,** remained unchanged externally; but unfortunately the Reformation did not restore to the office of parson what belonged to it of right. The tithes appropriated by the monasteries remained diverted from their parochial purposes. Numerous offices, which involved the cure of souls, were held by insufficiently paid vicars, which was chiefly the cause of the comparatively low degree of education enjoyed by the great mass of the clergy. This was one of the results of the aristocratic tendency of the Church, and was fraught with important consequences. By means of the far-reaching right of patronage the living is in close connection with, but also in dependence upon, the landed gentry; by the grants of a Church rate, that became periodically necessary, it is made to a certain extent dependent upon the parish. As in the highest grade of ecclesiastical government the spiritual and temporal state unite in a mixed court, so also upon this lowest level does a union of both take place in the constitution of the parish. (3)

The whole laity is subjected in ecclesiastical matters to this bureaucratic state, which in its various grades is subordinated to the Crown. Those who were formerly subjects of the ecclesiastical state have since the Reformation entered into a new relation of subjection to the Crown, in the same fashion as, according to the centuries-old ideas of ecclesiastical government, every Christian has become a subject of the representative of St. Peter. To the temporal oath of allegiance the spiritual is added; abjuration of the papal power is now the duty of all subjects, and violation of this duty is treason. By 28 Henry VIII. c. 10, whoever defends the authority of the Bishop of Rome by writing, printed

Canterbury; Chester, and Sodor and Man, which belonged to York. The jurisdiction of the bishops over the laity in the customary province of civil and criminal cases remained unchanged, with the modification that heresies were otherwise dealt with by the modern legislation. It was thought that the most pressing demands had been satisfied by the introduction of a few reforms in the spiritual courts. The decayed temporal local courts and the periodical assizes and quarter sessions were certainly not fitted to take over this jurisdiction.

(3) The development of the constitution of the parish is described at length in chapter xxxvi.

matter, sermon or doctrine, document or act, is subjected to the penalties of a *præmunire;* he who refuses the oath of abjuration, to the penalties of high treason, which in later legislation are extended to many other more detailed actions. The statute of Elizabeth demands the oath of supremacy of all persons in orders, graduates of the universities, schoolmasters and private tutors of youth, barristers and members of the Inns, attornies and notaries, sheriffs, under officials of the courts of justice, and all officers and servants of any court, under penalty of a *præmunire.* It was the traditional opinion of the age, deeply rooted in all classes of society, that the confession of the true Christian faith was the condition of all political rights, even of citizenship of the State. To alter such notions, to overcome the dissensions between clergy and laity, and the spirit of caste of the Roman Catholic clergy, and to blend what was general and ecclesiastical with what was national and particular, was not the work of one generation, but of permanent institutions, working in another spirit. The acts of supremacy and uniformity appear, it is true, as rigorous restrictions of personal liberty; but they were the necessary counterpoise to the much severer, much more exclusive system of the Roman hierarchy, which could never have been overcome by compromise and tolerance. The State Church, in the measures it adopted for the combating of heterodoxy, could, beyond all dispute, never be compared with the Roman Catholic Church in respect of the bloody, passionate measures employed by the latter. On the other hand, the State Church appears in truth more censorial, more magisterial, and more irritating with its long list of fines and imprisonments, its banishments, and innumerable penal cases of *præmunire.* Not everything, however, is to be regarded as heresy, which appears as such to the government of the time, but only "that which a recognized general council, the canons, or Acts of Parliament have expressly declared to be heresy." (4)

(4) The ecclesiastical allegiance had been for centuries historically fixed in the hearts of men. Elizabeth's reign, however, from the first had not tended

As a consequence of this conception, among other things the censorship of the press, also a significant element of power, passed from the Church to the Crown. An outcome of the struggle of the Church with the free-thinkers, towards the close of the Middle Ages, it first of all appeared as an emanation of supremacy. But it might also be attributed to the prerogative of the supreme maintenance of the peace, and was after the Reformation principally brought before the King in council. The right that was everywhere acknowledged, and the necessity for the censorship of the press which was on all sides asserted, is the most sufficient testimony of the degree in which the necessity for a uniform Church in a uniform State was rooted in the ideas of the nation. (5)

to enforce these laws according to the letter; they were to be, in the hands of the tutorial spirit of this administration, as tools which might be employed or not, according to circumstances. In the first twenty years no capital punishment was carried out against papists; fines and imprisonment were deemed sufficient for the purpose; and these produced as a rule an external conformity, with which the authorities could fairly enough be contented. The Catholic peers were dispensed from the oath of supremacy. It was not until the second half of Elizabeth's reign that the rigorous enforcement of this legislation began, linked hand in hand with the irreconcilable hatred of the Catholic party in Europe against the person of the Queen, and with a series of attempts upon her life, and conspiracies and intrigues against her government. In this direction also the person of the Queen is identified with the Reformation, and the religious and the political questions were not as yet separable. It is only too true that the Catholic sovereigns of Europe still adhered to the doctrine of their father confessors with regard to the identity of Protestantism and anarchy, destruction of all religion, and disorganization of society. To the good Catholics of those times Protestantism had almost the same meaning as at the close of the eighteenth century French republicanism had to the higher classes. Elizabeth found herself in this later epoch in a state of defence against mortal foes and under the political necessity of "prevention." She pointed to the deeds perpetrated by the Roman party in the Netherlands and in Catholic countries and above all, and rightly, to the laws of her own land, as has been expressly said by Lord Burleigh: "The allegation of the popish ministers in Paris, noting that her Majesty did promise favour, and afterwards did show extremities to the Catholics, is false. For her Majesty, at her entry, prohibited all change in the form of religion as she found it by law, and when by law it was otherwise ordered by Parliament, she did command the observation of the law newly established, punishing only the offenders according to law. So her Majesty's actions are justifiable at all times, having never punished any evil subject but by warrant of law" (Murdin's State Papers, 666).

(5) In exercise of the censorship of the press the Privy Council, after the invention of printing, issued frequent ordinances against the introduction of books and the regulation of their sale. According to an ordinance of Mary the possession of heretical or highly treasonable books is declared to be rebellion, and punishable according to martial law. According to the ordinance of

The spiritual relation of allegiance has been thus defined in all its relations. The old and new powers of the ecclesiastical government, the old authority of the "holy Church," the wonted allegiance of the laity to the Church,—all these form a chain of new forces in the power of the Crown. The provident protecting spirit of the ecclesiastical government pervades the whole of the political system and unavoidably influences also the character of the contemporary administration.

1559 no one was to print a book or paper without the previous licence of the Privy Council or of a bishop, and now, on the other side, the possession of Catholic controversial writings is regarded as especially punishable. In 1585 the Privy Council issues more rigorous ordinances for the regulation of the press, the registration of all printing-presses, the prohibition of all printing except in London, and a single printing-press in each of the two university towns. No one is to print a book or aught else until it has been seen, read, and approved by the Archbishop of Canterbury or the Bishop of London. The printers of statutes must obtain the *Imprimatur* of the justices. The sale of writings otherwise printed is punishable by imprisonment, and the Stationers' Company is empowered to have all the houses and shops of the printers and sellers searched, to seize all books printed in disobedience to these ordinances, to destroy the presses, to arrest the delinquents, and bring them before the council. Thus even under the Tudors, the weapon of press-censorship was employed for purposes of restriction.

CHAPTER XXXV.

Privy Council—Star Chamber—Courts of Justice.

With the retrogression of the power of the nobles after Henry VII. the Continual Council fell back into its original position. As in the fourteenth century, it is again the deliberative body, with which the King administers the whole of the business of the realm, so far as it does not devolve upon—

(i.) The central and lower courts in the ordinary course of justice;

(ii.) The Exchequer and the several administrative departments in the ordinary course of administration.

(iii.) The Parliament for extraordinary deliberation.

I. **The members and the functions of the council** are also actually again an emanation of the royal will, independent of any controlling influence of Parliament. "The King's will is the sole constituent of a privy councillor" (Coke). The name "Privy Council," which, sometimes occurring at the close of the Middle Ages, now becomes its regular title, is connected with this idea. The council certainly contains many names of lords, partly included as great officers, and partly for the sake of honour, and of certain dukes and earls as heads of the peerage; but an overflooding of the council by the Upper House (such as took place under Henry VI.) has now ceased. (1)

(1) The members of the Privy Council at the accession of Henry VIII. comprised the Archbishop of Canterbury (who was at the same time Lord Chancellor), the Bishop of Winchester (Privy Seal), the Earl of Surrey (Lord Treasurer), the Earl of Shrewsbury (Lord Steward), Lord Herbert (Cham-

As a symptom of the returning importance of the bureaucratic element, there now appears a law concerning the position and rank of the officers of the realm—"in consideration, that it is a part of the prerogative of the King to give his councillors and other subjects a dignity and position as in his wisdom appears best,"—the Statute of Precedence (31 Henry VIII. c. 14) is passed. First of all the vicar-general, as the King's representative in the ecclesiastical supremacy, shall take precedence of the Archbishop of Canterbury, in analogy to the Lord High Justice of former days, in respect of the laity. And then the rank of the ordinary officers of State was arranged as follows:—

1. In the first place the *Lord Chancellor* or *Keeper of the Great Seal*, who combines the various functions, dating from different times, of Keeper of the King's Conscience, head of the equity jurisdiction and the chancery of the realm, and as a rule also, of president of the Upper House, together with certain new legal duties. (2)

berlain), Sir Thomas Lovell, Sir Henry Wyatt, Dr. Routhale, Sir Edward Poinings, Sir Henry Marney, and Sir Thomas Darcy (State Papers, i. p. 507). Later, in 1526 and 1540, the professional bureaucracy was much more largely represented (Nicolas, vii. p. 4). In the North, the English *Vendée* of those days, this was a reason for dissatisfaction, and caused the rebellion of 1536. One of the popular grievances was "that the Privy Council was formed of too many persons of humble birth, whereas at the beginning of the reign it had consisted of a much larger number of nobles." Henry replied to this: that on his accession the council only consisted of two high-born lords, that others had only been made knights and lords by him; and that the rest had been lawyers and clerics, with the exception of two prelates, those of Canterbury and Winchester; that there were at present many nobles in the council, the Dukes of Norfolk and Suffolk, the Marquis of Exeter, the Earls of Oxford and Sussex, etc.; and that finally it was not the business of his subjects to appoint his council for him, and to interfere in matters which did not concern them (State Papers, i. 507, 508).

(2) The *Lord Chancellor* was for the first time also styled *Cancellarius Magnus* under Henry VII. on the occasion of the opening of Parliament (Foss, "Judges," v. 5). The historically doubtful office of Lord Keeper was defined by a declaration in 5 Elizabeth, c. 18, to the effect that both offices should be identical. The Chancellor is now also the overseer of charities (43 Eliz. c. 4). In consequence of the Reformation, a secularization of the office is gradually brought about. After Sir Thomas More the chancellors are sometimes spiritual and sometimes temporal statesmen; after Lord Keeper Pickering (1592) until our own day, with one single exception (Bishop Williams), they have been only lawyers. The numerous offices of the Chancery were now further increased by the *Six Clerks' Office*, consisting of six *notari publici*, who were formally incorporated under Henry VIII. and Elizabeth for the purpose of registering documents.

2. The *Lord Treasurer*, now directing minister of the finance department, and at times also leading minister of State. His sub-treasurer lays every year before the King a report of the revenue, such as is extant for the year 1507, and a whole series of the time of Henry VIII.

3. *The Lord President of the Council*, not as yet an essential officer. Occasionally the Lord Chancellor, the Lord Keeper of the Seal, or a court official, had the formal direction of the council; but in case a special president was appointed, he took the third place.

4. *The Lord Privy Seal*, until 30 Henry VIII. regularly an ecclesiastic, since that time as a rule a temporal lord.

5. *The Lord Chamberlain*, an hereditary office without administration.

6. *The Lord High Constable*, extinct as an hereditary office in 1521; since that time only created for one day at the coronation.

7. *The Earl Marshal*, a court office and heraldic office, without any department of State attached to it.

8. *The Lord High Admiral*, after 7 Richard II. regarded as an hereditary office, for the administration of the Admiralty; at that time of little importance.

9. *The Lord Steward of the Household*, administrating head of the court.

10. *The King's Chamberlain* in an influential position, frequently employed upon special missions, but without any administrative department.

11. *The King's Secretary*, at first merely an official of the second grade, but already a very influential member of the Government, who, at all events from the time of Elizabeth, had become one of the principal ministers of State. Shortly after 1539, the increasing pressure of business caused the appointment of two secretaries with similar duties. Each of them receives a signet for the sealing of all warrants and cabinet letters, "both inside and outside as was customary;" both keep their journal open for constant mutual inspection. Under Elizabeth there again appears one secretary, Sir W.

Cecil, who as such was regarded as the most influential member of the Government. In later times, on the appointment of his son to a similar post (1601), the title of "our Principal Secretary of Estate," evidently in the meaning of a Minister of State, occurs for the first time. (3)

In connection with this office new regulations were issued as to the procedure to be observed in the use of the royal seal. In the privy councillor's instructions of 18 Henry VI., a rule was contained for the gradation of the signet, privy seal, and great seal respectively (Nicolas, vi. pp. 187–193). The regulations of Henry VIII. secure a triple control. It was decreed that every gift, grant, or other written donation of the King under his signet, which is destined to pass under the great seals of England, Ireland, etc., or by any other procedure of the Exchequer, before passing under the said seals, must be delivered to the King's chief secretary or to one of his cabinet secretaries, in order to pass the signet office. The secretary shall within eight days address, in the King's name, *letters of warrant* under his signature, and furnished with the King's signet to the Lord Keeper of the Privy Seal. One of the clerks of the privy seal is then, after proper examination by the Lord Keeper of the Privy Seal,

(3) The history of the origin of the Secretary of State has been given by Sir H. Nicolas (vi. p. 117, *seq.*), as well as in a famous judgment of Lord Camden (Entick *v.* Carrington, Howel, "State Trials," vol. 19). The *Secretarii Regis* who are met with in earlier times were officials charged with special missions. Such were J. Maunsel, in 37 Henry III., and Franciscus Accursii of Bologna, in 6 Edward I. After the Keeper of the Privy Seal became a high State officer, a Cabinet Secretary naturally appears again in the confidential post that was formerly filled by the Lord Privy Seal, and in still earlier times by the Chancellor. This secretary is, however, during the Middle Ages, an officer of the third grade. Under the house of Lancaster a second French secretary was attached to him, who, even after the loss of the French possessions, remains still as "Secretary for the French language." In 1514 a Latin Secretary was also created for the Latin correspondence (not abolished until 1832). Under the Tudors the first Cabinet Secretary had advanced to the importance of a Cabinet Councillor. He ranks in 1489, at the confirmation of the Treaty of Peace with Portugal, in the list of witnesses, among the barons: and Dr. Routhale retains the office even for six years longer as Bishop of Durham. Under Henry VIII. he appears as a principal member of the council; he is often a bishop, after the Reformation, as a rule, a layman. He still remains a court official, and has his apartments in the household, with three servants, eight horses, etc. He is appointed by delivery of the signet; in the year 1558 a patent is also added. An oath of office is first mentioned in the Oath-book of 1649.

to send within eight days, a further warrant to the Lord Chancellor. (3ª)

The precedence of the great officers contains a mixture of social and purely official considerations. The most important great officers (the Lord Chancellor, the Lord Treasurer, the Lord President, and the Lord Keeper of the Privy Seal) are to rank in Parliament before the dukes, if they are peers by birth or have been ennobled. The Secretary of State, if he is a peer, ranks above the other barons. Moreover, the customary rules are adhered to which have become established in the House of Peers. "Where the Lord Chancellor, the Lord Treasurer, the Lord Privy Seal, or Secretary of State are below the rank of a baron, and have not therefore a right to vote, they shall sit upon the highest part of the sacks in the Parliament chamber in the above order." Where two secretaries of State are appointed, they shall both be present in the Upper House whenever the King or the Speaker is present. Otherwise they shall take alternate weeks, the one in the Upper House and the other in the Lower, but in particularly important business they shall both assist at the proceedings in the Lower House.

Special regulations were also issued by Henry VIII. touching the business procedure of his council. According to the rules of business of the year 1526, the administrative body was at that time to consist of twenty persons, namely, fourteen state and court officers, four peers, and two bishops. For the smaller Cabinet Council, which was to remain continuously in close attendance upon the King's person, ten members were

(3ª) From this process all warrants are excepted which the Lord Treasurer *ex officio* immediately issues for offices and lands within his gift. In like manner it is left to the discretion of the Lord Chancellor to proceed in urgent cases without the fees for the great seal, signet, or privy seal. Moreover, the King's express commands in private and State affairs remain reserved, without warrant and without private fees (Nicolas, vi. pp. 201–203). In later times there was attached to these regulations touching the State seal the responsibility of the Secretary of State to Parliament. And, under the presentiment of coming events, a King's secretary even in those days complained of the constitutional indefiniteness of his position. "All officers and councillors of princes have a prescribed authority, by patent, by custom, or by oath, the secretary only excepted;—only a secretary hath no warrant of commission," etc. (Thoms, "Book of the Court," 257).

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designated. For daily duty with the King the secretary and two clerics were appointed. After the manner of a modern Cabinet Council, the internal government of the realm was conducted by the council thus constituted with tolerable regularity. An extension of the system of personal government is however shown in this, that Government measures by no means invariably proceeded from it; they were not even all deliberated upon in the council. Henry VIII. was not usually present at the ordinary sittings, and only reserved to himself the right of personal signature. Important measures of foreign policy proceeded from the King himself through the pens of his secretaries, and often through those of others. In confidential matters he corresponded with his own hand and read all letters himself. Wolsey and Cromwell were his principal advisers so long as they remained in favour; after Cromwell's fall, he addressed his orders sometimes to one and sometimes to another of the ministers, but none of them was again able to gain an ascendant position. The communications between the King and the heads of the departments passed, in accordance with the rules of business, regularly through a privy councillor. Under Elizabeth, William Cecil was in a very favoured position. Under Elizabeth, in fact, the council reached the height of its political importance. For the internal government of the country it is the era of the King in council and of wise laws. In many of these laws, originated by the intellects of Elizabeth's statesmen, two whole centuries of subsequent legislation have found little to improve. (4)

The delegations and commissions of the council, which even in the preceding period exercised an extraordinary civil and criminal jurisdiction, develop in this period into

(4) The rules of business prescribed by Henry VIII. for the Privy Council are contained in the regulations laid down for the royal household of 1526 (Nicolas, vii. pp. 5–7). As to the voting in the council, according to an old custom, the youngest member voted first, the King himself last (Coke, "Inst.," iv. 55). The extant records of the Privy Council, especially those of the years 1540–1544, which are very detailed, certainly show a curious mixture of great and petty business, and particularly a strange picture of the Star Chamber justice of those days.

a peculiar new creation, which requires a special description.

II. This is, **The Privy Council as Star Chamber,** the Star Chamber of world-wide notoriety, the institution of which was first brought about by social disorders, and afterwards by the controversies of the Reformation.

It was at first the remnants of wild party struggles, the partiality and venality of the sheriffs and the juries, the insolence of the magnates and their armed retinues, which rendered an energetic police system under Henry VII. necessary. "In consideration of existing great tumults and illegal assemblies, corruption and partiality," the stat. 3 Henry VII. c. 1 empowers the Chancellor, Treasurer, and Keeper of the Privy Seal, together with a bishop, a temporal lord of the council, and two justices of the realm to examine persons upon royal order, and to punish them for seven offences specially enumerated, among which are sedition, illegal assemblies, and factious unions with distinctive liveries and badges. This is the extraordinary criminal power of the King in council (vol. i. p. 417) which had never ceased, and which was here acknowledged afresh and embodied in a commission. The King only announces that, owing to the necessities of the times, he intends to exercise his criminal jurisdiction, and delegates for this purpose a smaller number of privy councillors with the assistance of two judges. Henry VIII. continues the institution, but adds that, in these criminal cases, the president of the council shall also belong to the essential members or quorum (21 Henry VIII. c. 20), and later, that the judges shall only have deliberative voices, by which a freer administrative exercise of the jurisdiction is intended. Analogously by 31 Henry VIII. c. 8, "disobedience to ordinance" is assigned to a number of great officers, bishops, and judges for punishment. The so-called Star Chamber is accordingly only a committee of the Privy Council, on which account also every privy councillor could occasionally take part in the proceedings, and even the whole body sit as Star Chamber, as was done at first in important cases,

and later, at all events from Edward VI., was the general rule, whence this penal jurisdiction became quite an ordinary portion of the political business of the ministerial council. The name Star Chamber, as the technical term of an independent tribunal, occurs in no statute; it was only the name taken from the room where the sittings took place, which the popular language applied to the council when administering penal justice. Coke also describes the Star Chamber as *curia coram rege et concilio*, consisting of the "members of the Privy Council, with the assistance of two judges;" only with this difference, that in this later period a claim of the peers as *Magnum Concilium* to take part in its proceeding was again asserted by some, just as had been done in the fifteenth century. (5)

In the second half of the sixteenth century, however, the following new conditions met together. First of all, the need of the Reformation, with its important inroads on ecclesiastical authority and ecclesiastical property, which, like all radical transformations, required dictatorial powers that could only in later times be limited and circumscribed by law. And next, the spirit of persecution and arbitrariness which, originating in religious controversy, spread an inquisitorial spirit abroad throughout the whole of the political system. Finally, the tacit understanding between the council and Parliament

(5) The Privy Council as Star Chamber has been treated of in Hale's "Jurisdiction of the House of Lords," c. v.; Palgrave's Essay on the King's Council, p. 104, *seq.* The description in Hallam, "Const. Hist.," i. c. 1, is too artificial. Touching the old controversy as to the penal jurisdiction of the council, *cf.* vol. i. pp. 407, 408. In the temporary stat. 31 Henry VI. c. 2, all cases for the jurisdiction of the council were declared to be "great riots, extortions, oppressions, and grievous offences." The new stat. 3 Henry VII. c. 8 goes further in many various directions, and mentions unlawful maintenance, giving of signs and liveries, tokens and retainers, embracery, untrue demeaning of sheriffs in the returns and panels of juries, great riots, unlawful assemblies, as such offences in which the petty juries were unwilling to do their duty. These statements were, in fact, right. How important the local influence of the magnates still was is shown, for example, by their being prohibited to make their private officials sheriffs. Venality of the sheriffs and juries, deeds of violence, and rascality of all sorts were described in the law-books and by historians as events of everyday occurrence. A passing attempt to extend the summary penal jurisdiction of the justices of the peace beyond its old dimensions proved abortive in the face of the powerful magnates.

touching the "suitable" extension of such an administrative jurisdiction. It will probably never be possible to explain in legal technical language the altered spirit of the institutions embodied in the stat. 3 Henry VII., and the connection with the old *jurisdictio ordinaria* of the council. The dictatorial sovereignty of the Tudors, at all events, exercised these arbitrary powers in a more moderate and dignified manner than they would have been exercised by a party government with ecclesiastical or political leanings. As to how a party administration of a political tendency and a partial ecclesiastical government would have exercised these powers, the short misgovernments under Edward VI. and under Mary do not allow of a doubt. (5[a])

The proceedings in the Star Chamber were never regulated by law. There were framed for this procedure maxims not unlike those of administrative justice in civil matters, that is, analogous to the procedure of the Lord Chancellor in equity cases. A court, consisting entirely of officials, pleadings with witnesses, documents, and affidavits, without a jury, becomes of itself inquisitorial in form, and consequently the use of torture was also gradually introduced. (5[b])

(5[a]) A legal difficulty lies in this, that under Henry VIII. and later (1) the penal functions are extended with indefinite limits to a number of new cases, (2) the participation of the councillors is not limited to those persons enumerated in stat. 3 Henry VII., but is extended to the whole body of the council, that is, to those members who actually participated in the proceedings without the assistance of the justices. This is in one direction explained by the discretionary powers, which from all time lent a *jurisdictio extraordinaria* to the council, and which, in spite of much dispute, were ever afresh recognized by Parliament, and exercised according as the needs of the times required, and on the other side, by the nature of the religious controversies. The position of the royal ecclesiastical power could be in no way so clearly defined by legislation as could the old provinces of the temporal administration. The discretionary powers which had here freshly sprung up extend, as is usual, into other spheres (Nicolas, vii. p. 26, *seq.*). That such was less felt, as a public grievance in large circles, is to be explained in some measure by the centralization, which had to contend with great difficulties, in order to summon persons living at great distances, by their bailiffs, and to bring them before the Star Chamber. (*Cf.* Marquardsen in the "Münchener Kritischer Vierteljahrschrift," 1860, pp. 213–219.)

(5[b]) The procedure of the Star Chamber is essentially that of Chancery, after the pattern of the trials according to canon law, with the Chancellor originally as president. From inquisition in purely bureaucratic bodies the ardent desire to extract confession necessarily arises, and thence again the custom of torture, which all English jurists have certainly declared not

Thus arises a State court of justice from which there is no appeal, with a somewhat indefinite penal jurisdiction, a terror to the powerful, and on that very account for a long time popular. Contemporary writers speak of it with respect. Sir Thomas Smith, himself one of Elizabeth's ministers, lauds the Star Chamber as a good institution of Wolsey. The most violent opponent of all administrative justice, Sir Edward Coke, who himself, as Attorney-General, took part in its proceedings, says, "It is the most honourable court in Christendom, except our Parliament; this court, if the right procedure and the old rules be observed, keeps the whole of England quiet." A tendency to protect the oppressed was certainly to be praised in such an institution; but it contained also the root of many far-reaching and evil things. Comprising in one body a ministerial council and State court of justice, the Star Chamber could wield an irresistible power over persons and property, by which it systematically trampled down all resisting independence, and finally also every right. What was originally a necessity of the times, a transitional form, perhaps necessary during the conflicts of the Reformation, became occasionally, even in the later part of Henry VIII.'s reign, the scene of petty denunciations on account of "disaffection" towards the King and the law. It was principally the indifference of Parliament which rendered this practice of administrative justice possible. If the controlling influence of Parliament could be entirely dispensed with, this formed the debatable ground on which the attempts at restoring an absolute government must begin. (5c)

to be a portion of the common law, though it has been acknowledged by all as an extraordinary procedure. Thomas Smith and Sir Edward Coke, who expressed themselves so strongly on the subject, themselves, in the capacity of examining judges, repeatedly applied the torture which was in such cases inflicted on the special order of the King or Privy Council. Individual cases of torture upon royal orders had already occurred in former centuries.

(5c) The character of the court is moreover different under every Government; under Henry VII. it forms a State protection against powerful evil-doers; under Henry VIII., Edward VI., and Elizabeth, a powerful instrument for the carrying out of the Reformation. Contemporary writers acknowledge in so far the excellence of its working, excepting in "political cases." But the more important political cases also were at the bottom cases of resistance to the authority of Church and State, and the whole period was still deeply

III. *The other* **delegations of the council** *and the newly created tribunals* follow again immediately upon the period of the rise of the estates. Before all others, the equitable jurisdiction of the Chancellor, as being an original emanation from the powers of the King in council, continues, and, owing to the permanent position of Master of the Rolls and that of the whole of the Chancery officials, as well as in consequence of the fixed rules of competence and procedure, has now attained in the main the character of a *jurisdictio ordinaria.*

But besides, there is still maintained the idea of a supplementary court tribunal, which is to be accessible in civil actions to every subject, as a kind of *forum miserabilium personarum.* Before the council, under the name of the *ordinary council,* civil actions were still heard, and this special commission for judicial matters continued unassailed during the period of the Tudors (Nicolas, vii. pp. 16, 22). There existed a certain need for it in the case of actions between native and foreign merchants, disputes of corporations, questions of maritime law, and pauper cases. The English courts of law were even in those days much less accessible than they should have been to the poorer classes, the expenses of barristers and attornies, the fees of the sheriffs and lower officials, and the too great nicety in framing the pleadings in an action, made a court tribunal of this description appear a welcome alleviation in legal procedure.

In close connection with this, stood the so-called *Court of Requests,* which, under the Lord Privy Seal, was composed of several Masters of Requests, doctors of civil law having an analogous position to that of the Masters in Chancery. The origin of this court in the administrative practice of the council is doubtful. Under Somerset's protectorate, probably already under Henry VIII., an institution of the kind is met

pervaded with the duty of the magistrates to defend the true faith. Even the extreme ecclesiastical opposition still demanded that the people should be energetically "compelled to the doctrine and confession of the true faith." In the proceedings against Wentworth, the Lower House itself even enjoined an examination to be conducted after this fashion (Reeve's "History," v. 231, 232). The short-sightedness shown in employing such institutions for the most immediate popular purposes has been at all times nearly the same.

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with. As, however, this court of royal commission had neither a statute nor yet time-honoured usage as its basis, the King's Bench, in 41 Elizabeth, in a leading case, declared that it was no constitutional court, and was not authorized to administer justice, whereupon the Crown let it drop.*

More permanent were such commissions of the King's Court as were composed with the assistance of a jury, notably the newly created *Courts of the Steward;* to wit *the Court of the Lord Steward, Treasurer, and Comptroller of the Household* (3 Henry VII. c. 14), and the *Court of the Lord Steward* (33 Henry VIII. c. 12), with a criminal jurisdiction in cases of treason, murder, manslaughter, etc., in royal residences.

In like manner, the *Admiralty Court in criminal cases,* under Henry VIII., was constituted by a commission issued to the Lord High Admiral and certain justices, who were to proceed according to the rules of common law and with a jury, under the style of the *Commissions of Oyer and Terminer of the Admiralty at the Sessions House in the Old Bailey.*

A second group of new tribunals is created round and about the Treasury, for special branches of the hereditary revenue.

This is the *Court of Augmentations and Revenues of the Crown,* which was first instituted by 27 Henry VIII. cc. 27, 28, for the administration of the secularized monasterial estates. To this court was attached the general survey of demesnes, under a chancellor as head for the keeping of the great seal and small seal, two general surveyors, and a numerous body of other officials. (6) In a *Court of Wards and*

* A peculiar creation in the form of a kind of commercial court is that court constituted by 43 Elizabeth, c. 12, for the decision of assurance-disputes, composed of a commission consisting of the admiralty judge, the Recorder of London, two doctors of civil law, two common law jurists, and eight merchants, with an appeal to the Chancellor. This commercial court has, however, disappeared generations ago, and indeed, commercial and trade courts and other attempts at the formation of special courts for special trading and professional classes never made any progress in England.

(6) When the stat. 27 Henry VIII. cc. 27, 28, first dissolved the small monasteries with revenues up to £200, a separate *Court of Augmentations* was formed for the administration of the estates thus secularized, at the head of which was a chancellor with a great and a small seal. In later times the secularization was extended to the great monasteries and other foundations (altogether 2374 institutions). In consequence of this extension, the original

Liveries, moreover, the administration of the feudal wardships was severed from the *Exchequer*, and in this court the grant of feudal investitures was conferred, apparently in the well-meant intention of moderating the strict financial principles of the Exchequer. (6ª)

A third group of a peculiar character is formed by the *new provincial governments*, which were not parcelled off from the central administration, according to the old system of self-government, but on a more bureaucratic pattern. Under the direction of the Privy Council, they formed a provincial delegation of the council in counties where restless neighbours and internal disquietude rendered them necessary. Thus arose in the first instance the president and council in Wales, including Wales and the marches, as well as the counties of Hereford, Worcester, Salop, and Gloucester. Then the president and council of the North, comprising Yorkshire, Durham, Northumberland, and Westmoreland. A concurrent jurisdiction with the council of the North was exercised further by the three courts of the Scotch marches (east, west, and middle marches), which included Northumberland, Cumberland, and Westmoreland. Like the council, these departments have the jurisdiction of commission courts in criminal and civil cases "where one of the parties is too poor to take the

court was again abolished by patent, a new court instituted and combined with a general survey (*Court of General Surveyor of Lands belonging to the Crown*), which had been created meanwhile. As in the mean time doubts had arisen as to the constitutional legality of the former abolition by patent, the tribunal was newly constituted by stat. 7 Edward VI. c. 2. Henry VIII. had already, however, alienated and granted away the confiscated estates in large numbers; Mary gave back to the old livings the appropriated tithes, glebes, etc., which still remained, and in consequence abolished the whole court. The still remaining administration of demesnes and forests reverts again to the Exchequer (1 Mar. Sess. 2, c. 10).

(6ª) The *Court of Wards and Liveries* is also a piece of financial administration which passes into the form of a particular administrative jurisdiction. By Henry VIII., firstly, a *Court of Feudal Wardships* was instituted, which had the guardianship of wards and lunatics, gives the king's widows permission to remarry, and exacts the fines for marriage without licence. It is a court of record under a *Master of the Wards*, who is at the same time Keeper of the Seal. The procedure is copied from that of the chamber of the Duchy of Lancester, with four yearly terms, and with powers of pronouncing sentence of arbitrary imprisonment. A year after its institution the feudal investitures (liveries) were also assigned to the *Court of Wards*. The court in this form continued until the abolition of the knights' fees under Charles II.

ordinary legal course." The judges are empowered to pass judgment either according to the common law and custom, or in the way of equity according to their wisdom and unbiassed judgment (that is, with or without a jury). This last clause was agreed to upon the urgent demand of the rebels in the North. (6[b]) Finally, Lancaster also retained its separate Chancery and Star Chamber, when under Henry VII. it was taken over as a special appendage of the Crown.

This movable organization of the administration, in which an influence of the Reformation and extended bureaucratic powers are already visible to a dangerous extent, is now contrasted with

IV. **The Central Courts of Common Law** in their perfectly unchanged form. The three Courts of King's Bench, Common Pleas, and Court of Exchequer are, as formerly, composed, as need required, of three, four, or five justices. The increase of judicial business in the year 1579 occasioned primarily the appointment in the Court of Exchequer, of Robert Shute, "with equal rank and dignity as the justices of the other two courts." Soon all the assisting judges of this court were appointed from among the leading barristers, who were qualified for the judicial office, and accordingly take part in presiding at the assizes, so that from this time forth the three divisions of the central courts of the realm are, as regards their constitution, on an equality with one another.

The appellate jurisdiction of the Upper House over these official courts of the realm has decayed in this period, because the assignment of higher appeals to the House by writ of error has fallen into comparative disuse. But as in the preceding period an appeal from the Court of Exchequer was directed to lie to a committee of the Council, by stat. 27 Elizabeth, c. 8, a supreme court was so formed for judgments of the King's

(6[b]) In these new provincial tribunals a bureaucratic spirit of the organization, which as a fact was based upon local exigencies, is visible to a greater degree. A creation analogous to the Court of the North was also a *President and Council in the West*, established by stat. 32 Henry VIII. c. 50, with like authority in the counties of Devon and Cornwall, which was, however, soon abolished.

Bench that the appeal should go from the King's Bench to the united bench of the Court of Common Pleas and the Court of Exchequer. Under the name of the *Court of Exchequer Chamber*, this appellate jurisdiction thus assumed a purely judicial character. Altogether the constitution of the courts and the personal position of the justices appears, in spite of their revocable appointment and their position of justiciaries of the council, to be a dignified one, and maintains during the whole period a high reputation and character for impartiality. The Tudors never enforced their personal wishes in the courts of common law, and in fact never interfered with the regular administration of justice. Their worthy demeanour in this respect reminds us of the best periods of the monarchy in Germany. (7)

Supplementary to certain provinces of the civil jurisdiction there exists the equitable jurisdiction of the Lord Chancellor (vol. i. p. 407), which gradually also assumes a judicial character. The Tudors show no inclination to extend this province of their jurisdiction; the stat. 27 Elizabeth, c. 1,

(7) The Courts of Common Law, in their external composition, are treated by Foss ("Judges," v. 8, 405, 409, *seq.*). The former customary rule of conferring the dignity of knighthood upon the justices now becomes more rare. Elizabeth, who according to the habit of wise monarchs conferred honours and titles sparingly, was wont only to honour the presidents of the courts with the dignity of knighthood. On the other hand, the Tudors were studious to maintain the personal integrity and external independence of their justices, for which reason a large increase was made in the official salaries. In the assessment of incomes in 15 Henry VIII., the chief justice of the King's Bench was assessed at 1000 marks, of the Common Pleas at 650 marks, the chief baron at £400, the assistant justices at £400, 500 marks, £240, and £200 respectively. Among the barristers, the serjeants were taxed at £100 to £250, the attorney-general at £500 (Foss, "Judges," v. 99). As to the right of visitation, *cf.* Reeves (v. 250).

Though it is frequently asserted that the justices of these times showed great subserviency to the wishes of the monarchy, yet we must judge this by the standard of the Upper House of those times. As to the honourable attitude of the judges in their remonstrance addressed to the council on account of arbitrary arrests in the year 1581, *cf.* Hallam ("Const. Hist.," iii. c. 5). Equally honourable is the behaviour of the judges in the matter of a royal order of April 21st, 1587 (in Anderson's Report, 154), where the Queen disposes of an office which was to be regarded as a freehold of the then possessor, whereupon the justices, remembering their oath, refuse obedience, and the Queen yields. In their capacity as legal advisers of the Upper House, legal questions were sometimes laid before the common law judges, as on the accession of Henry VII. In these functions also the conduct of the judges appears honourable. Henry VIII. himself, in a speech before Parliament, refers to their opinion as to the principle of the constitution of Parliament.

even forbids every "application to other jurisdictions to impeer or impede the jurisdiction of the King's courts," and the Crown evinces no opposition, when the penalties of *præmunire* are applied to encroachments by equitable jurisdiction upon the province of the ordinary courts of law.

This fixed portion of the executive administration completes the whole picture of the Tudor epoch. Judicial, parliamentary, and parochial constitution in their entirety display a form of government in which, on the whole, uprightness and efficiency are the dominant qualities. The dynasty had found the realm, on its accession to power, in a state of the utmost disorganization, owing to the transcendent power of the factions of the nobility. To restore the royal power and justice against the mightiest in the land had been its first task, and for this the traditional prerogative gave sufficient power. By the further acts of the Reformation, the powers of the ecclesiastical government passed to the Crown, as an inexhaustible fountain of new elements of strength. After the fusion of the ecclesiastical hierarchy with the monarchy, the temporal institutions are pervaded throughout by a new monarchical spirit, which is most prominent under Elizabeth. But the Tudors made use of this increase in their power both externally and internally in a royal manner, by energetically upholding the Reformation, and by a social and political development of the national strength. Even though the religious element in Henry VIII. was rigidly subordinated to the political, his three children, when they came to reign, by the sincerity of their convictions —though in contrary directions—rehabilitated the monarchy in the religious feeling of the people. The transition from the old to the new Church made a personal government necessary in this province, for which the character of Henry VIII., violent indeed, and egoistical, but clearsighted and energetic, was found sufficient. In this position, Henry VIII. and Elizabeth often put down all resistance to their will in a haughty manner. But, though imperiousness or selfishness may have guided their steps, they never wished to rule without

Parliament, but always to govern in accordance with the law. The assurance of Elizabeth, with which at the close of her reign she repaired the error with regard to monopolies, "*that never thought was cherished in my heart, that tended not to my people's good*" (Parl. Hist., iv. p. 480), found a ready echo in the hearts of her people. The faults and harsh deeds of this courageous, energetic dynasty were the faults of the times in which they lived, and of the people with whose greatness, welfare, and right they wished to identify themselves. It is an epoch of great excitement and intellectual movement, such as seldom maintains itself except at the expense of the character of individuals and classes. But all this made the personality of the Tudors, with their courage and energy, the main feature of an era which in spite of all its faults was a great one. (8)

(8) The whole character of this Government must be judged by contrasting the judicial, parochial, and parliamentary constitution with the proceedings against individuals, the Star Chamber, and the laws of high treason of the period. The latter were at all events modified in one respect in the stat. 11 Henry VII. c. 1, which dispenses with the penalties of high treason in the case of the subject who takes the oath of allegiance to a King *de facto* (rightly estimated in Hallam, iii. 196). This is supplemented by a law of Edward VI. declaring the necessity of producing two witnesses to prove high treason. The application of the laws touching high treason to a denial of supremacy is a violent outrage on our religious feelings, but the sixteenth century saw in it a legal consequence of the old ecclesiastical government. In 1 Edward VI. the bloody laws relating to high treason were again repealed, but isolated cases were afterwards again made amenable to heavy punishments. Mary repealed all new felonies as far back as 1 Henry VIII., but proceeded all the more mercilessly in ecclesiastical matters, and in temporal matters more inquisitorially than did Henry VIII. The enormous changes in Church and society had, as in the German Reformation, confused the people's sense of right and wrong, and made the nation inclined to sacrifice the rights of individuals to a political power which aimed at great ends and showed itself able to attain them. In such times pride and self-importance vanish from amongst the ruling class, and only return when the ranks of society have become more firmly established. In small as in great matters the tendency of the times had been to enhance the personal sovereign power, and to make the nation inclined to endure much with patience. The union of the factions of the two Roses under Henry VII. had, after three interruptions in the course of three generations, ended in the restoration of a regular succession of the dynasty. A wild struggle that had lasted for thirty years, and disaffection and demoralization within, remained as the warning tokens of a change of dynasty before the eyes of the nation. Henry VIII. was on this account from his childhood up "a humoured and spoiled piece of royalty;" but he was also "the majestic lord, who broke the bonds of Rome." The Reformation made him a counterpoise to a still more hated despotism, and his personality the indispensable instrument of the great national work. Compared to a Cardinal Pole and his supporters this kind of absolutism was

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a brilliant foil. The great majority of the people never doubted in their choice between the two. Contrasted with bloody Mary and Spanish Philip, Elizabeth appeared to the people as an angel of deliverance, with all those qualities which gain for the monarchy the people's love. The Reformation was more worthily personified in the Virgin Queen than in Henry VIII.: this is proved by the even over-anxious care of the people for the safety of the royal person. All these circumstances combine to enhance the monarchical, and with it at once the magisterial and paternal spirit of the Government

CHAPTER XXXVI.

The Development of the Parochial System.

Within the development of this period, which was at times tragic but still majestic, and at its close brilliant, there had been formed in the lower strata of the State and of society new elements of coherence which were scarcely noticed in the great movements of the time. As among the dynastic struggles and barons' battles of the preceding period the formation of the estates, which was destined to have such an effect upon the future, pursued its steady quiet course,—so there took place amid the gigantic movement of the Reformation, a development of the local constitution and with it an organization of the lower strata of society, which imparted to the struggles of the following century an unforeseen and entirely novel character.

Hand in hand with the union of the royal and the ecclesiastical administration, which was effected by the Reformation, the provident paternal spirit of the royal supremacy transferred to the temporal State the humanitarian duties of the Church, which the clergy, diminished in numbers and straitened in means, could no longer fulfil, and regulated these offices as permanent duties of the parish. This new system follows closely on the already existing institutions for the maintenance of the peace; but whilst the latter, in their old form, had only been occupied with the warding off of evil, these new institutions adopted the political idea of the Church, viz.: the duty of providing for the poorest and most indigent

elements of society. From these points of view, from the Tudor period, the local village constitution, which had up to that time been very insignificant, develops into an important member of the community-system, and thus becomes a fundamental institution of the State. The communal institutions during this period are developed from the lower grades upwards; which in a certain sense is contrary to the former course.

I. **The Constitution of the Parish,** which in the Middle Ages only belongs to the ecclesiastical side of the State, enters into the political State as the lowest member. In their Anglo-Norman form, the tithings appear only as sub-districts, in which the provost, tithing man, in the capacity of judicial and police bailiff, had to carry out the orders of the sheriffs, bailiffs, and chief constables. This weakness of the tithing, which had not even been territorially separated, acted upon the various kinds of landed property, and was in turn reacted upon by them, for close peasant villages with connected farms had never been the rule in England, but, on the contrary, the preponderance of the great landed interests over the copyholders, cottagers, tenants, small tradesmen, and labourers had from early times been firmly established. Church and parsonage accordingly became the centre, the soul of the village. The Sunday gathering at Church service, the celebration of ecclesiastical acts and feasts, and the common graveyard were stronger elements for a local village system than the military, judicial, and police institutions, of which the *villata* is merely a subdivision. Accordingly through a long and silent change the "parish," in the common notions of the people and in everyday language, takes the place of the tithing. In the majority of *villatæ* both are locally identical. But the greater townships include several parishes; and on the other hand the parish often embraces many tithings, especially in the north of England. As within the ecclesiastical and civil state at the head of the Government, so here in the lowest grade the ecclesiastical and civil communities draw closer and closer together. The elements of

this union lie partly in the local Church offices, and partly in the Church rates, but most of all in the new offices and in the new rating system, of which the legislation of the Tudors makes the parish the basis.

1. The parson of the place, the *rector*, or, if he does not own the tithes, the *vicar*, is, in the ecclesiastical sense, the head of the parish. Regarded from the point of view of the civil constitution, in respect of rates and public burdens, he is only a distinguished member of the village community, liable to taxation and to public burdens. Since the Statute of Marlebridge, however, the parochial clergy were released from suit of the sheriff's tourn, and so far enjoyed a position of immunity. After the origin of the office of justice of the peace, respectable and wealthy parsons were also appointed upon commissions of the peace, by which means the idea of a magisterial office, even in the civil sense, becomes established. The legislation of the Tudors adds to the parson's office some elements of a police character; the control of the church attendance of papists, the duty of giving information respecting certain offences against the laws of the Reformation, the registration of the characters of domestic servants, and even the infliction of corporal punishment upon vagrants. Later legislation has, however, not continued in this direction.

2. Two *churchwardens* (1) are from the ecclesiastical point

(1) As to the office of churchwarden, the practical treatise by John Steer ("Parish Law") lacks historical data. In Burn's "Ecclesiastical Law," the principal information upon the present subject is in the articles "Churchwarden," in vol. i., and "Parish," in vol. iii. Great merit is due also to T. Smith, for the use he has made of the older sources, in his "The Parish" (1857, 8vo). Convincing proofs are here given in particular of the preeminently civil character of the institution, and of the old right of the community to the office of the churchwardens. They appear as early as the year 1343 as Wardens of the goods of the Church, in the Rot. Parl. 15 Edward III., and in the Year-books 11 Henry IV.; as guardians of the temporalities of the Church in the Year-books 37 Henry VI. *seq.* 30. It was only gradually that the name "churchwarden" became technical and regular. Judicial practice expressly recognized them as officers of the parish, and not of the patron (Strange's Reports, p. 715), as temporal officers (13 Coke's Reports, p. 70): "of common right, the choice of churchwardens is in the parishioners, and, if the incumbent chooses one in any place, it is but by usage" (Cases *temp.* Hardwicke, p. 275). "The archdeacon has not the power to elect or control their choice" (1 Salkeld's Reports, p. 166). "The

of view only subordinate assistants of the incumbent. In addition to these there appear in great parishes also *synodsmen, sidesmen, questmen,* as assistant officials; but as a rule the functions of the sidesmen are combined with the office of churchwarden. Their duty to give information of all notorious crimes touching the Church, the clergy, and parishioners, is also included in their oath of office and again enjoined in the *canones* of 1603. But in its civil bearings, the office now attains a new importance in consequence of the institution of church rates, which we shall immediately discuss. Whilst the parish is responsible for the keeping of the church buildings in repair, so it obtains an undoubted right to share in the management of the Church property, for which the churchwardens have been recognized by judicial practice as an active corporation. As the decaying office of constable no longer appeared sufficiently reliable for the various functions of a magisterial office, a number of local magistrate's duties were by degrees imposed upon the churchwardens. In the Tudor era it was principally such as are connected with ecclesiastical discipline: the infliction of penalties for non-attendance at church, for breaking the fasts, the desecration of the sabbath, taking part in conventicles; and in later times also the infliction of penalties for tippling and drunkenness, for breach of the game laws, offences concerning weights and measures, tramps and hawkers, etc. All this, combined with their position as overseers of the poor, gives them the position of regular and chief officers of the parish, to be elected according to tradition by the parish, whilst according to the *canones* of 1606, failing amicable

clergyman never summons the vestries; for this is the office of the churchwardens" (Strange's Reports, p. 1045). "The ecclesiastical court has no jurisdiction to ratify a churchwarden's accounts" (*ibid.*, pp. 974, 1133, etc.). "The parish can accordingly remove him at any time from office" (Year-books, 26 Henry VIII., fol. 5). "The parishioners have then the right of appointing other wardens, who shall have an action for the rendering of an account against those who have been deposed" (Year-books, 8 Edward IV., fol. 6). The old ecclesiastical *canones* of 1571 expressly mention an election by the parish. The legal recognition also of the necessity of an annual re-election in 27 Henry VIII., c. 25, sec. 23, expresses that the office was regarded as analogous to the ordinary parochial offices and not to the Church offices.

arrangement, one churchwarden is to be appointed by the parish, and the other by the clergyman. (1[a])

3. The lower offices of *sexton* and *beadle* are servile offices, which may also be employed for the secular functions of the parish. The office of *parish clerk* is frequently filled by a young assistant cleric, who assists in responding in the prayers and in other parochial duties. But with the increasing business of the parish he becomes a very active member of the parochial administration, and in this position is also remunerated and appointed by the parish.

Intimately connected with this personal side, is the taxation side of the parochial constitution, the origin of the *church rate* for maintaining the church building. From time immemorial a fixed portion of the church revenue was to be set apart for this purpose. But, as a fact, even in the thirteenth century the revenues of the richly endowed Church were no longer sufficient for the purpose, since the episcopal sees and monasteries in increasing numbers claimed the tithes and Church property. Accordingly, appeals were made to the "good will" of the parishioners, whose contributions were from the first voluntary. When, in the face of growing embarrassments, coercive ecclesiastical measures began to be

(1[a]) It was the consolidated State Church that, in the Canons of 1603, first raised still greater pretensions by introducing the following clause :—

Canon 89. "The churchwardens shall be chosen, if possible, by the combined consent of the clergyman and the parishioners. But if they cannot agree as to such choice, the clergyman shall choose the one and the parishioners the other."

From the point of view of the common law these Canons are as yet binding laws only upon the clergy. The dominating influence of the State Church since the times of the Stuarts has, however, so far succeeded in insisting upon the stronger right of the parson, that this proceeding is the custom in the majority of parishes, and that only in the London parishes the election of both churchwardens by the parishioners is established as the recognized custom. Moreover their double functions are self-evident; for (1) the wardens as being curators of the church buildings, of the churchyard, the church walks, and in their capacity of guardians of the personal property of the church, are at all events only partly ecclesiastical officers; in their exercise of the police functions of the church, the churchyard, the services and the Sunday, as also in controlling and keeping the church books they are purely church officers; (2) as purely civil officers they appear in the assessment and collection of the church rate, as overseers of the poor, and in their discharge of the duties of a lower constabulary and magisterial office, which is imposed upon them by later legislation.

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employed in the spirit of the Church government of those days, the temporal courts probably retained a power of prohibition. But on the other hand, in 1285 Edward I. issued an instruction to the justices of the realm, the so-called statute *Circumspecte Agatis*, in which this clause occurs, "that the common law courts shall not punish the spiritual tribunals, if they only administer justice in purely spiritual matters, particularly *si praelatus puniat pro cemeterio non clauso, ecclesia discooperta, vel non decenter ornata.*" According to the constitution, as it then existed, this instruction has the force of law, and was in later days described in the stat. 2 and 3 Edward VI. c. 13, sec. 51, as a statute. Thus a right of coercion was indirectly acknowledged as belonging to the spiritual tribunals, and this could be enforced against individuals by excommunication and in an extreme case by interdict against the whole community. As a rule, however, an amicable arrangement was effected. Whenever the clergymen convoked his parishioners through the churchwardens, the villages, accustomed to bear common burdens, were found ready to grant contributions for the keeping in repair and beautifying of the church. The oldest known mention of what was (later) called the *church rate* is in the Year-books of 44 Edward III., where it is mentioned as being a custom in a single parish. At a time, when the court leets gradually began to decay, occasions for assembling the ecclesiastical parish frequently recurred. The raising of these contributions became now a chief duty of the churchwardens. But as the original fact of their voluntary initiative was kept in mind, the condition of a previous consultation with the parish was adhered to all the more strictly, seeing that, in this parliamentary age, the right of co-deliberation for every one who joined in paying the taxes passed from the greater to the lesser affairs, and became a common legal principle. In the course of the fifteenth century, such parochial assemblies appear to have been adopted as a comparatively uniform practice.(1[b])

(1[b]) As to the origin of the church rate a great deal has been written in consequence of the controversy of the last generation, from among the mass

To the parish, in the ecclesiastical sense, belong all persons who are included in the cure of souls, comprising also women, children, and domestics—inhabitants in the widest sense. But by the demand of positive performances, both in money and in personal duties, there arises the civil idea of an *active parish*—parishioners in the narrower sense of the term—in which designation only those are included who bear their share of the public burdens. The fundamental principle of *paying scot and bearing lot* has made its influence felt as a common-law maxim quite as much in the parish as in the city. The given basis for Church grants was, however, the Christian household as such. The church rate appears accordingly from the very beginning as a personal rate, assessed according to the size of the household, whether this be based upon freehold or copyhold, upon permanent or temporary possession, upon rent or tenure. In this question it was evidently not considered whether or not a parishioner was liable to the judicial and police burdens and parliamentary taxation, but only whether he participated in the permanent benefits of the Church as a permanent member of the parish community. As was customary with other local burdens, in practice those who lived outside the parish were made liable in proportion to the extent of their landed property (Jeffery's case, 5 co. 67). But whilst the temporal taxes are only additions and compositions in lieu of what were originally personal services in the militia, the law courts, and the police, and therefore political rights are primarily regulated by personal liability to service, so also in this parochial burden the tax in money is the chief thing. The quality of a parishioner is accordingly purely determined by his liability to contribute to the parish taxes, as is evidenced by its registration in the parish books. This liability of contribution gives the right to a vote in the parish affairs (Smith, "Parish," pp. 63, 94, and quotations).

of which I only here mention the Letter of Sir John Campbell, afterwards Lord Chief Justice of England, to Lord Stanley, on the law of church rates (1837). Moreover, I may refer to the detailed discussions on the special subject contained in my "History of Self-Government."

The exaction of the church rate, after previous deliberation with the parishioners, became accordingly one of the principal functions of the churchwardens. The assembly of the parishioners took place, in harmony with the object in view, if possible in the vestry, whence these parochial meetings themselves obtained the name of *vestry*. The meeting was summoned by the churchwardens; the chair was regularly taken by the parson, as the landlord of the vestry, and the first member of the ecclesiastical parish, as a matter of courtesy, but a positive right of presiding could be established neither by precedent nor by analogy. In analogy with the tax-granting commoners, the meeting was rather regarded as its own master, in respect to the appointment of a chairman as well as in respect to its adjournment. The voting was conducted with equal rights for each individual, after the manner of the old courts leet, the parliamentary elections, and the parliamentary resolutions. The mode of giving the vote was, as a rule, by show of hands, but in difficult and doubtful cases by a poll.

According to an enumeration of Stowe, taken from the sheriffs' reports, the number of parishes in the year 1371 amounted to 8632; in the year 1520 their number was given as 9407. The parish, in this form, offered itself to the Tudor legislation as an elastic member for new and important rules of the commonwealth.

II. The most important and most enduring local creation, which proceeded from this union of the ecclesiastical with the civil State, is seen in the **parochial management of the poor.** The actual relief of the poor devolved in the Middle Ages upon the Church, for which in England one-third of the tithes was set apart. In later times it was one of the chief functions of the monasteries, partly as an original object of their foundation, the duty of hospitality being imposed upon them, and partly because they had appropriated a number of tithes. The temporal legislation only busied itself negatively with measures for the prevention of begging and vagrancy (23 Edw. III. c. 7; 12 Rich. II. c. 7). According to 19 Henry

VII. c. 12, beggars who are incapable of work shall go into the hundred in which they were born or have lived for the last three years; all begging elsewhere being prohibited. By 22 Henry VIII. c. 12, the justices of the peace were empowered to settle among themselves upon districts to be assigned to beggars who were unable to work as "begging districts," going beyond the boundaries of which was punishable with the stocks and bread and water. All able-bodied beggars were to be flogged and forced to return to their birthplace or to the place where they had spent the last three years. (2)

But from this time forth the Government undertakes actual relief of the poor. By 27 Henry VIII. c. 25 the individual hundreds, incorporated towns, parishes, and manors are directed to support the poor by voluntary alms in such a manner that they be not compelled to beg publicly, under penalty of twenty shillings a month for each person who refuses to contribute. The churchwardens and other wealthy inhabitants are to make collections on Sundays by boxes and other methods for this purpose, and the clergy are to make use of every occasion to exhort the people to charity. The duty of employing those capable of working, and that of helping the incapable was laid upon the churchwardens or two "others of the parish." The parochial poor-law system of later times was thus founded in its essential outlines. The principal cause of it was the early changing of feudal into free labour, which at times occasioned great fluctuations and distress among the labouring classes. Under Henry VIII., as the date of the statute proves, the first impulse proceeded rather from momentary calamities than from the abolition of the

(2) The history of the English poor-law legislation is treated of in R. Potter's "Observations on the Poor Laws, on the Present State of the Poor, and on Houses of Industry" (London, 1755); Brown's "History of the Poor Law" (1764); F. M. Eden, "State of the Poor, or a History of the Labouring Classes in England" (3 vols., 4to, 1796); Sir George Nichols, "History of the English Poor Law" (1854); R. Pashley, "Pauperism and Poor Laws" (1854); V. Kries, "Die Englische Armenpflege" (1865). The Middle Ages adhered strictly to the distinction between the negative and the positive element of the poor relief, and assigned the former to the State and the latter to the Church (23 Edw. III. c. 7; 12 Rich. II. c. 7). The earlier statutes of the Tudors (19 Henry VII. c. 12; 22 Henry VIII. c. 12), were only continuations of this purely police system.

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monasteries. But through their secularization there naturally devolved upon the Crown a moral duty to make actual provision for the poor, seeing that the appropriated tithes were also charged with this obligation. These had in great measure passed to favourites and private persons, whilst the burden of relieving the poor now devolved in an increased degree upon the parishes, to become again, in a uniform distribution, a burden upon real property.

On that very account the legislation unswervingly adhered to the direction it had once and for all taken. It is true that the act 1 Edward VI. c. 3, passed under the nobles' protectorate of the minor King, recurs to the most barbarous coercion of able-bodied beggars, who are threatened with branding, slavery, and death, but after the lapse of three years the more merciful law of Henry VIII. was restored. According to 5 and 6 Edward VI. c. 2 the collectors, on a particular Sunday in the year, immediately after service, "shall put down in writing how much each man was willing to contribute weekly for the following year," and if any one should be obstinate, the clergyman should exhort him kindly, etc. The stat. 5 Elizabeth c. 3, however, strengthens the "kind persuasion" of the clergy by a writ of summons to appear before the next sessions of the peace, and the justices of the peace are again to urge him kindly, and finally, if he refuses to be persuaded, to assess him at a proportionate contribution for the poor, and in case he then refuses, to put him in prison until he pays. By 14 Eliz. c. 5 the justices of the peace were generally empowered to assess the inhabitants for contributions, and, in case of necessity, to exact these contributions by imprisonment. At the close of the sixteenth century the alarming increase of professional beggars and vagrants led to the appointment of a committee of the Lower House, to which, among others, Sir Francis Bacon belonged, to take into general consideration the necessary measures of public charity, of enforced employment of paupers, and of the punishments to be inflicted for mendicity and vagrancy. Relief of the poor and police had formed for gene-

rations a connected and inseparable system, embracing under four heads (1) police punishments for mendicity and vagrancy; (2) the compulsory obligation of the working classes to go to service, to which were added somewhat later (3) the institution of workhouses and houses of correction; and (4) a system of public charity through the medium of the parishes. (2[a]) The result was six connected laws, all important for the parochial administration, of which only the statute 39 Elizabeth c. 3 belongs here, as it contains the outlines of the pauper legislation in a narrower sense, which comes to an end with the reign of Elizabeth. (2[b]) The stat. 43 Elizabeth c. 2, which

(2[a]) The original ecclesiastical legislation made, as is known, four portions according to which the tithe should be distributed. In England, as a rule, only a threefold division is spoken of, as the endowment of the bishoprics had been very plentifully provided for in another way. Therefore one-third was to be employed for the *fabrica ecclesiæ*, one-third for the poor, and one-third for the clergy. Sensible gaps were caused accordingly by the secularization of the convent estates under Henry VIII., and still more by the confiscation of the property belonging to the guilds and hospitals under Edward VI. But according to the tendency of the writer the importance of the monasteries for the relief of the poor was frequently overrated. Hallam justly remarks, on the other hand, (Const. Hist., i. 108), "There can be no doubt that many of the impotent poor derived support from their charity. But the blind eleemosynary spirit inculcated by the Romish Church is notoriously the cause, not the cure, of beggary and wickedness. The monastic foundations scattered in different counties could never answer the ends of local and limited succour. Their gates might, indeed, be open to those who knocked at them for alms. . . . Nothing could have a stronger tendency to promote that vagabond mendicity which severe statutes were enacted to repress." The Church and the monastic institutions lacked in the form they had assumed the necessary staff and the money for an effectual relief of the poor. In the altered condition of society the relief of the poor could be no longer separated from the police of the poor. Only by the temporal legislation and by the co-operation of the parishes was the bare police system capable of being effectually blended with the humane measures of pauper-relief; and the first only remind us still too vividly of the whole of the barbarity which, with so much that is great, pervades the temporal institutions of the Middle Ages. According to 27 Henry VIII. c. 25 lazy vagabonds were to suffer the extreme penalty of the law, "as felons and foes of the commonwealth." According to 1 Edward VI. c. 3 every able-bodied man who will not devote himself to any honest labour, and will also not go into service, shall be branded on the shoulder as a vagabond, and shall be assigned as a slave to any one who will have him, to be kept by him for two years on bread and water. If he absconds he shall be adjudged as a slave for life, and if he again runs away he shall suffer the extreme penalty of the law as a felon. This was repealed by 3 and 4 Edward VI. c. 15. But in 14 Elizabeth c. 5 the rule was again inserted, that rogues, vagabonds, and sturdy beggars should suffer capital punishment if they repeated their offence more than once. It was only upon the consolidation of the whole legislation affecting paupers and the supervision of labourers that these barbarities disappear.

(2[b]) The consolidated social and political group of laws of 39 Elizabeth is, for the time in which it was framed, a masterpiece; cap. 1, *against the decay-*

has for more than two whole centuries regulated the English poor-relief, is only a new version of this law. The leading principles of the great poor-law are—

1. The relief of the poor is the general and uniform burden of each parish. But the pauper has not the free choice of applying to any parish at will, for the former laws remain in force, according to which persons who cannot or will not work are compelled to remain in the same parish in which they are domiciled, *i.e.* in which they were born or have lived for the last three years. This contains at the same time the basis of a right of settlement; yet in such a manner, that the poor, according to the wording of the law, find a bare subsistence in their present place of abode, and that a removal to their parishes only take place in the case of rogues and vagabonds. (*a*)

2. For the personal functions of this poor-relief the parochial office of *Overseers of the Poor* was created. In every parish the churchwardens are to be primarily the guardians of the poor, and in addition to them two or more overseers of the poor, who are to be appointed annually by the justices of the peace from among the well-to-do residents. These overseers of the poor are to adopt measures for the employment of all persons, who without having the means of living, are engaged in no regular trade or business for the gaining of their sustenance. To this end they are empowered "to raise such sums of money as they shall require

ing of towns and houses of husbandry; c. 2, *for the maintenance of husbandry and tillage*; c. 3, *for the relief of the poor*; c. 4, *for punishment of rogues, vagabonds, and sturdy beggars*; c. 5, *for erecting of hospitals and working houses for the poor*; c. 6, *touching lands given to charitable uses*; c. 12, *concerning labourers*. Two centuries of parliamentary legislation have not been able materially to improve upon any essential rule of Elizabeth's poor law. As to the final result of the long experimental course of legislation, the earlier steps have been in later time wrongly forgotten. Lambard, Coke, and Dalton pass over the old statutes before Elizabeth in a manner that tears asunder the historical connection of the parochial system. From ignorance of the old conditions of things, in England also the very well meant but ill-considered advice is repeated at the present day, namely, to leave the whole of poor-relief to "the Church."

(*a*) The districts of the poor-law system are in principle the parishes. The later legislation of the restoration yielded, however, to the desire for separation, and left it to those interested to divide the parishes and to organize for the smaller unions, so far as they are suited for the purpose, a separate system of poor-relief.

for the purpose of providing a sufficient supply of flax, hemp, wool and other goods or stuffs, in order to employ the poor; as also the necessary moneys for the support of lame, blind, and old persons and such as are unable to work, and for the placing out of their children as apprentices." Persons who refuse to work, they can send into a workhouse or prison, and they may also build a separate poorhouse for the poor of the parish who are incapable. (*b*)

3. For the purpose of raising necessary means for the relief of the poor, the law empowers the churchwardens and overseers of the poor "to raise the necessary sums by the assessment of every inhabitant, incumbent, vicar, and others, and every owner of lands, houses, and tithes, etc., in the said parish," by which a parochial *poor rate* was legally constituted. The basis of the new demand is accordingly the Christian household as such, just as in the already long existing church rate, and includes every occupier, whether his house consist of freehold or copyhold, in permanent or temporary possession, rent or tenure; and also those living beyond the boundaries with their real estate. Thus arises a complete fixed tax, which was destined to become the basis of all parochial taxation. (*c*)

(*b*) The appointment of overseers of the poor was made according to Elizabeth's law by the justices of the peace. This must be regarded as an innovation. When the older law of 27 Henry VIII. c. 25 left to the parishes the duty of providing for the employment of able-bodied paupers, and helping those unable to work, by the churchwardens or two others, it was naturally left to the parish to appoint their agents on their own responsibility. The reasons for Elizabeth's innovation were that it was thought that by means of this appointment the very unequally distributed and faulty system of relief could be better carried out, and that an appointment by the public magistrates was considered more effectual in the case of a new burden which had been introduced in the face of some opposition. Later practice took a medium course, by giving the vestry a right of proposing and treating the appointment by justices of the peace only as a confirmation.

(*c*) The creation of the church rate in Elizabeth's law is the fusion of the former attempts into a uniform system. The Church had always acknowledged the liability of the clergy in respect of their tithes. According to the *Injunctions* of 1547 and 1559, "all parsons, vicars, prebendaries, and others having livings, if they do not reside upon their livings, shall, provided they have annually £20 or more to spend, for the future distribute among the poor parishioners or other inhabitants, in the presence of the churchwardens or other honest men of the parish, the fortieth part of the fruits and income of the said livings." From this point of view the mention of the parson or vicar among the first of those liable to contribute, and the particular prominence given to the tithes

III. In a like spirit the burdens of maintaining the highways and bridge-building were provided for by the Tudor legislation. The *trinoda necessitas* was regarded as a common burden even in the Anglo-Saxon State, in which the old popular array, which had sunk down to the position of a *posse comitatus* of peasants, was employed on such services. The Norman period enforced the keeping in repair of the highways and bridges by the ordinary police fines, viz. amerciaments. The widening, alteration, and closing of highways was regulated by an order issuing from Chancery, a writ *ad quod damnum*, by which the sheriff was instructed to determine by means of a commission of inquiry, whether the proposed change would not be prejudicial to the public. The keeping of ways and bridges in repair was a constant object of debate in the sheriffs tourn and in the court leet. An appropriate division was made of this duty, by which the burden of the highways was incumbent on principle upon the small villages, whilst the more onerous burden of building and repairing the bridges fell upon the whole county. Actual use by the public rendered all the inhabitants liable to the work of repair (Coke, Inst., ii. 700). These principles, as they had been formerly uniformly applied by the Norman administration, were regarded as "common law." Their maintenance depended, according to the police practice of Norman times, upon a procedure by indictment, and primarily indeed by presentment before the King's Bench, the itinerant justices, or the criminal assizes. The sheriff could by a commission be charged with this duty, until by 28 Edward III. c. 9 this part also of his judicial functions was withdrawn from him. Besides this there lay an ordinary indictment by private persons against the responsible parish. By 22 Henry VIII. c. 5, sec. 1, presentments before the general sessions of the justices of the peace were allowed to be of equal effect with those laid before the assizes. Last of all, a financial

as objects liable to taxation is explained. So long as Elizabeth's law was enforced in its original sense by the "industrious employment" of the poor, the total mass of poor rates appears to have remained within moderate limits. According to statements of Coode and Nicholls it amounted in the year 1650 to £188,811.

criminal information *ex officio* could be laid before the common law judges.

The Tudor legislation practically simplified and supplemented these principles. The Statute of bridges (22 Henry VIII. c. 5) imposes the duty of contributing to the bridges upon all householders, whether they possess lands or not, and upon all real estates, whether their owners live in the county or not. The troublesome and inadequate procedure by indictment leads further to the formation of a new parochial office (according to the principle of the division of labour), that of *Surveyor of Highways*, by 2 and 3 Philip and Mary c. 8. To this officer of the parish is now transferred the primary duty of keeping the highways in repair, and, with this object, he is empowered by the statute to make liable to manual and cart services, in proportionate gradations, according to the extent of their real estate, all the inhabitants, landowners, as well as the possessors of a team, householders, as well as cottagers and labourers with their own households. Thus the same bases of a parochial constitution were laid, as in the case of the poor-law system, namely, the parish as the district; the surveyors as local officers, elected by the members of the community liable as responsible representatives of the communal-duty; performance in kind in proportion to the size of the household and the real estate, which in later times was gradually changed into a money rate according to the scale of the poor rate. (3)

(3) The highway statute 2 and 3 Philip and Mary, c. 8, graduated the parochial burden in this manner: every possessor of an acre of land has at a given day or place to provide a waggon or a cart, drawn by oxen, horses, or other beasts of draught, according to the custom of the county, together with two able-bodied men and other requisite utensils. Every owner of a team or plough in the parish has also in like manner to provide a waggon with two men; instead of the waggon, on demand, two men must also be provided. Every other inhabitant, householder, cottager and labourer who is able to work and who is not in a domestic relation of annual service, must on the same day do manual service either in person or by an able-bodied representative. Persons of the middle class (forty shillings annual rent from land, £5 in personal property) are to furnish two men (18 Eliz. c. 10, sec. 2). The burden of making the highways is therefore still based upon performances in kind. According to 5 Elizabeth c. 13, and 29 Elizabeth c. 5, six working days were fixed by the justices of the peace for the repairing of the roads. But in case the manual work provided by law was insufficient,

Closely connected with this reconstruction of the highway liability are the highway police regulations. According to the older highway statute the courts leet are to inquire into all offences against the statute and inflict fines and amerciaments. In case they neglect their duty, the justices of the peace shall hold inquiry at the sessions. But according to 5 Elizabeth c. 13 every official information of a justice of the peace touching a "highway out of repair" shall have the force of a presentment by twelve men, and on the ground of this "conviction" the penalty shall be immediately inflicted. A police regulation affecting the breadth and clearance of the highways had been already contained in the statute of Winchester (13 Edward I. c. 5). By 5 Elizabeth c. 13 these provisions were specialized, and became still further specialized into highway regulations touching lighting the roads, keeping them dry, sign-posts, milestones and the removal of nuisances of all kinds, the enforcement of which now pre-eminently devolves upon the justices of the peace. Already, by the statute of Winchester, the constables were to make periodical reports as to the state of the highways, which duty in later times passed to the surveyors of highways.

A somewhat different, though in many respects an analogous, course was taken in the arrangement for water communication. Regulations for harbours and navigation were connected with the old constitution of the so-called Cinque Ports. A lighthouse and pilot code follows under Elizabeth, simultaneously with the formation of privileged corporations for this purpose, for duties and rights of this kind could not well be incorporated with local parochial unions. A similar system was followed in the dyke-unions, which were formed, as the nature of the land required, of the persons interested. *Commissioners of sewers* had been already created in the

this service did not secure the parish against an indictment for roads insufficiently kept; for the statutes are only made "in aid of the common law" (Dalton, "Justice," c. 26). It was necessary, accordingly, in such a case that supplementary taxes should be raised.

Middle Ages and were more exactly regulated in the spirit of the older institutions by 23 Henry VIII. c. 5. (3ª)

IV. By the foregoing regulations **the village constitution and a new system of parochial rates** became consolidated, depending upon the three following facts:—

The district of this village is the parish, which now thrusts into the background the old tithings and townships with the decaying office of constables. The overseers of the poor and of the highways, the poor rates and highway rates, now form the connecting link between the ecclesiastical parish and the temporal State.

In the system of parochial offices, those of the churchwardens and overseers of the poor are, in the first instance, intentionally associated together—a practical expression of the "non-separation" of Church and State. In their church functions the churchwardens are subordinated to the ecclesiastical authorities, and, in the poor law administration, to the temporal magistrates (the justices of the peace), moreover with rights and duties similar to those of the overseers of the poor. The right of the parish to elect its churchwardens continues as a popular elective element side by side with the right of the justices of the peace to appoint the overseers. The right of the parish to vote the parochial taxes for the church rate, and the right of the overseers of the poor to levy a tax for the poor rate, mutually modify each other by constraining to harmonious working. Somewhat less important appear the offices of overseers of the highways and the constables.

The parish rates from this time gain a much increased

(3ª) The commissions of sewers are regulated according to other principles. The keeping of the drains in repair is the permanent interest of the land and not of the parochial union as such. The necessary contributions for this purpose, *sewers rates*, were by law charged to the endangered landowner as such (6 Hen. VI. c. 6), and not to the occupier, like the parish rates. The necessary magisterial powers were given by a royal commission. The commission forms a court of record, that is, a court with discretionary penal and executive powers, and proceeds according to circumstances by inspection or with a jury, either according to the custom of the dyke-unions or according to need and discretion. At the same time it enforces by summary penalties the police regulations it decrees.

importance. The demands made upon the commonwealth were in the Middle Ages simple, so long as the labouring classes were included in great numbers in the larger households. The village system in the Middle Ages embraced, moreover, only functions in which personal service and performance in kind predominated (such as militia, courts of law, police, and making of highways). To the modern parochial system finance was also added. The church rate was indeed still often raised in a patriarchal manner for certain church purposes, by the levying of a poll tax of one penny; the poor rate, on the other hand, was a considerable, uniformly levied rate, exacted by the overseers of the poor. Such was also the bridge rate. The making of highways was still managed by performances in kind, but they are essentially incumbent upon the same class of occupiers and landowners. The system of a parochial taxation, which is based upon the household according to the scale of the visible profitable property in the parish, is thus the ordinary type of all parochial taxation. Certain deviations from it in the church rate, in the burden of making the roads, and in the police contributions were easily ignored, as the differences were scarcely worth mentioning, and their correction would have involved a disproportionate elaboration of accounts. The poor rate could still be regarded as the regular tax, and all else merely an appendage and addition to it. Legal analogy, simplification of the business of assessment, the habituation of the ratepayers to it, and the common exercise of the functions of a court of higher instance by the justices of the peace, all worked together to bring all local rates by degrees under the same category as the poor rate.

In consequence of all these manifold duties which devolved upon it, the parish has gained a stirring life, and with it also the energy for new formations, which appear in the form of parochial committees for parochial purposes. The committees of assessment date back to the Middle Ages. Beside them there now appear *committees of jurats*: that is, four or eight arbitrators appointed on oath for the amicable settlement of

disputes between neighbours. Frequently a kind of parochial administrative council, a *committee of assistance*, is mentioned, consisting of thirteen persons, who have formerly been churchwardens or constables, and who afterwards formed the later so-called *select vestries*.

From the whole system of the new organization there sprang up further a right to make by-laws, a right which at first proceeded from the practice of the court leet. If the parish undertook the levying of public and constitutionally recognized contributions, such as the church rate, or if it fulfilled legal obligations, such as making roads and relieving the poor, it was also to be empowered to make rules for the "better fulfilment of them." In this spirit the judicial practice in early times recognized the resolutions of the majority as having the binding force of law: "By-laws for the reparation of the church, or a highway, or of any such thing which is for the general good of the public" (Coke, Reports, v. p. 63*a*). The condition was, however, here observed, that no rate should be raised but for such legally authorized purposes, or for such as, like the church rate, were based upon old custom and indirect recognition of the law, and that nothing might be enacted which was against the common law.(4)

(4) For the consolidated parish constitution of this period the treatise of Toulmin Smith, who with personal predilection undertook the unearthing of the parochial system, which had been almost buried in the eighteenth century, is a most valuable work ("The Parish, its Powers and Obligation at Law," London, 1857, 8vo.). Nor are the historical merits of the work diminished by various one-sided legal views, which were sure to arise from the contrast to the habitual disregard of the local parochial life and to the modern centralization. Among these errors the principal one is the over-estimation of parochial autonomy. The right of making their own by-laws, and the right of self-taxation only existed in England for objects and purposes, which were entailed upon the parish by law as a common obligation. The judgments quoted by Smith, taken together, refer to the older law which required that the police fines to which the members of the community had rendered themselves liable should be raised by the community, and the subsidies voted in Parliament apportioned amongst them (Smith, 558, 563). Of the greatest interest is the constitution of the committees, which were organized as they were required. Committee of jurats (Smith, 229); committee of assistance (229); committee of watch and ward (230); committee for assessment (230); committee for raising and distributing poor relief, for audit, of destruction of vermin (230). This laborious parochial government was the means of bringing about many village festivities, concerning which the Bishop

All these institutions taken together determined the powers of the vestry. A constitutional right of being consulted resided in the parishioners only in the case of the church rate, owing to the circumstances of its origin. To this right was added a similarly acquired right of electing churchwardens, or at least one of them. A right of electing the surveyors of the highways had been already given by stat. 2 and 3 Philip and Mary. A right of proposing candidates for appointment as overseers of the poor was naturally added. A right of proposing or electing the constables belonged, according to time-honoured custom, only to the court leet, and this latter, which was dependent upon special privilege, includes a different circle of persons than the parish, and falls into decay after the fifteenth century. A right of electing the constables, based upon principle, could under these circumstances hardly appear. Many questions of local government were, however, naturally brought up by the officers for discussion before the parish, without a legal obligation to do so. From the time of the Stuarts, the development of these customs was certainly different in different places. Where a wealthier class of tenants or freeholders existed in country parishes, and agricultural husbandmen in the borough parishes, such open vestries busied themselves pretty actively with parochial affairs. In other places the active participation in such affairs was limited to an old committee of parishioners or an administrative council of former overseers of the poor and constables, which easily filled up its number by co-optation. After a few generations this institution appeared, under the name of a *select vestry*, as an established custom. Again, in other places everything was restricted to the annually appointed and chosen officers. In such matters political leanings have

of Bath announces on the 5th of November, 1663, that his parochial clergy are of opinion that such village festivities should be retained (Smith, 499, 500). Such ecclesiastical, judicial and other feasts occur under the name of "ales" (as among the German peasants, the "*Kindelbier*," etc.), and are known more specially as bridge-ales, church-ales, clerk-ales, give-ales, lamb-ales, leet-ales, midsummer-ales, Scot-ales, Whitsun-ales, and others.

had less influence than local exigencies and convenient custom.

V. The newly constituted parish now becomes immediately connected with the **county police administration**, and especially with the **county magistrates**, and, through the justices of the peace, comes into further connection with the central Government.

The legislature, immediately on the constitution of the parochial system, took care to form a court of higher instance, as well in the case of the taxes as in that of the local government. In the case of the taxes this was most effectually brought about in the matter of the poor rate. Two justices of the peace approve the rate assessed by the overseers of the poor. Two magistrates of the same class may, if the parish shows itself incapable of maintaining its poor, assess another village within the hundred to supply the deficiency; and if this also is not sufficient, the quarter sessions shall assess a parish within the county "to make it good." The quarter sessions decide the appeals against the rating. Two magistrates issue the writ of distraint, if execution is resorted to. Two magistrates receive the accounts of the retiring overseers of the poor, and enforce the delivery of the amounts if necessary by writ of execution, subject to an appeal to the quarter sessions. The quarter sessions assess every parish at a proportionate rate for needy persons in the prisons and hospitals. By orders of the magistrates questions of the right of settlement, of conveyance of paupers to their parish, and compensation for disbursements arising between the several parishes are decided. In the province of the management of the highways they fix the working days for repairing the roads, decide appeals, and afterwards levy the necessary supplementary tax, should such be needed, according to the scale of the poor rate. In the case of the bridge rate, the imposition is made immediately by the quarter sessions.

In the department of the local government, the appointment of the overseers of the poor is, in the first place, made

by two justices of the peace. Two magistrates enforce by fines the holding of monthly sittings, and by the penalty of imprisonment the presentation of an annual account. Two magistrates approve the industrial employment provided by the overseers for the parish poor. By the order of two magistrates, the poor are kept at forced labour, are compelled to serve apprenticeship, relatives are summoned to contribute to the support of destitute persons, and the father for his bastard. The magistrates may in urgent cases order relief for a needy person. They compel by penalty the overseers of the poor and the constables punctually to fulfil certain official duties. The quarter sessions, finally, are the general court of appeal for "all persons who feel themselves aggrieved by any action or neglect of the churchwardens or overseers of the poor" (43 Eliz., c. 2, sec. 6). For the surveyors of the highways, whose appointment is in this period still made by election by the parish, the quarter sessions, together with individual justices of the peace, form the controlling court of higher instance for the due carrying out of highway regulations, and they decide in their sessions legal points which may arise. The management of the county bridges is the immediate province of the quarter sessions. The subordination of the constables and their duty to appear periodically at the sessions to make their presentments, and to report upon the state of the roads, was a relic of the old police system. With the decay of the court leet the appointment of the constables passed more and more to the board of magistrates, and from the right of appointment arose in practice also a right of dismissal. The coroners were by 1 Henry VIII. c. 7, rendered subordinate to the magisterial power of inflicting penalties for breach of duty. Only the churchwardens are subordinated to the justices of the peace purely in their capacity of guardians of the poor.

As the local officials were in all matters made responsible to the magistrates, so also by the subordination of the office of justice of the peace to the central administration, that unity in the administrative system was attained, which, in

the continental States was only technically developed somewhat later by the formation of a "*Staatsrath*" and "*Behördensystem*" for the provincial and district government. The police control, especially that of the police for trade, labour, and order, the State and parish taxation, the militia system, and that of all other more important branches of the temporal administration, had now been thoroughly regulated by statute and ordinance, and the councillors of the Crown were now regarded as responsible to the King and to Parliament for the due execution and maintenance of this legal order. It was necessary, therefore, to allow the Privy Council and its delegates the means for conducting the government of the country according to these laws. The governmental system of the Tudors had accordingly already carried out the system of administrative control of modern government in all its three functions.

1. A disciplinary or penal power for breach of the law over the persons of the magistrates, sheriffs, and military commissioners, and through these over the constables and all other executive officers of local government, is effectually exercised by the right of dismissal of all these officers, who from the Lord Chancellor down to the village constable, are revocably appointed (*durante bene placito*). Beyond this, however, there extends also a right of inflicting summary punishment, such as from its origin in the Anglo-Norman era (Vol. i. p. 195) had never been given up by the kings. As this right had in the preceding period been even put into execution against the members of the common law courts, and had only gradually fallen into disuse on account of the honour of the permanent judicial office, so did the exercise of it by the itinerant justices, and in consequence by the magistrates, who had taken their place as permanent *custodes pacis et justiciarii*, become a more and more natural consequence. It is, accordingly, in fact, only a declaration of the existing system, when the statute (3 Hen. VII. c. 1) touching the Star Chamber reserves to a select committee of the Privy Council a penal jurisdiction over all abuses of office of whatever

kind. It was only a declaration, when in 4 Henry VII. c. 12 the King issued a solemn address to the magistrates, exhorting them to the faithful exercise of their office, if they would avoid his highest displeasure, and under threat of immediate removal from the commission and punishment for disobedience. That this penal jurisdiction was comparatively seldom exercised, was only a consequence of the more simple and effectual right of dismissal.

2. A power residing in the central administration, controlling the orders and precepts of the magistrates, was a result of their position as delegates of the royal judicial and peace powers. As this had always existed for the measures of the itinerant commissioners, it was natural that this power should, as a reservation of a continual intervention on the part of the royal government, *supplendi et corrigendi causa*, proceeding from the Privy Council as well as from the King's cabinet, be equally valid in the case of this permanent commission of magistrates. Hence followed in the first place the obligation of the local commissioners to make report (*certiorari facias*), and to obey the direct mandates issuing from court. In like manner it was one of the functions of the itinerant justices of assize, in their character as the highest *custodes pacis*, and as representatives of the central courts (as which they had been regarded since Henry VI.) duly to instruct the magistrates, to warn them, and threaten them even with deposition and punishment, as very often happened. In fact, there was only too urgent cause found for exercise of this supreme jurisdiction, in consequence of the partiality and demoralization in a generation, which had grown up amid the party struggles of the Roses, and which continued under the party struggles of the Reformation. All proposals of Parliament for the abolition of the abuses and mistakes of the administration gained their effect only through these corrective powers of the King and the royal council, which controlled the magistrates, the sheriff, and the local boards.

3. This controlling court becomes of itself a double legal

remedy, that is, as a court of appeal for the protection of subjects, so soon as it exercises its jurisdiction on the motion of corporations or private persons. The innumerable petitions of private individuals addressed to the King and the royal council, as well as to Parliament, presuppose that the King and the royal council can and ought to interfere *corrigendi causa* with the orders and measures of the county and local administration. Its existence as an administrative court of higher instance is an especial presupposition of all parliamentary action with regard to national grievances. If, accordingly, the historians of this period as well as the Parliaments complain of the severity and impartiality of certain measures of the Privy Council, any denial of the principle of these corrective powers is perfectly alien to the Tudor period.(5)

From this building up of an administrative system from the parish to the Star Chamber and to the King's cabinet, it results that the permanent constitution of the common law courts could only in a limited degree guarantee the legal rights of individuals; that, on the other hand, whilst the personal will of the King and of the Privy Council in the Star Chamber could to a great extent prevent injustice and

(5) A disastrous error has been committed by modern historians, and in particular by Hallam, in portraying this character of the royal council as a disciplinary, controlling, and appeal court, in the light of attacks and encroachments of the Privy Council. This notion is perfectly foreign to contemporary historians, Parliaments, and jurists; it is rather the result of a dating back of conditions belonging to the eighteenth century. When Lord Coke (Inst., iv. 17) declares the extension of a "punishment" of disobedient magistrates in the Statute 4 Hen. VII. was a natural presupposition of the ordinary course of law in an action, this was a pious wish of the honourable Lord Chief Justice, which could not be enforced against the Privy Council, and of the fulfilment of which no instance is known. It was not until the period of the Stuarts that after severe abuses of the royal power, upon the one side the administrative controlling power and court of appeal of the royal council (cabinet) was almost abolished (*vide infra*, chap. l.); whilst in other directions a feeling of judicial independence and of judicial duty all together had become developed in the magisterial bodies, hand in hand with the now recognized irresponsibility of the jury. In Toulmin Smith this conception rises to such a pitch that in his over-zealous local patriotism for the parish he regards the appellate jurisdiction of the justices of the peace, of the Privy Council, and of the Parliament, and even the whole of the parliamentary legislation as almost a usurpation practised against the autonomy of the parish, as a false "parliamentarianism" compared with the good old common law. As if a modern State were conceivable without administrative laws, and as if administrative laws were conceivable without a thorough control exercised over their due execution!

partiality, they could also themselves inflict these evils, so soon as an exercise of the royal power in a monarchical spirit ceased, as was the case after the death of Elizabeth. With the period of the Stuarts, accordingly, Parliament begins to aim at restricting the supreme administrative power. In another direction it is apparent, that the judicial independence which resides in the honorary officers of *self-government* by virtue of their possessions, contains the requisite energy to resist a despotic government. Finally it becomes gradually apparent, that the cohesion which the lower strata of society have gained by the local constitution of this period, both in Church and State, has engendered a manly spirit which is able victoriously to face the constitutional struggles that ensue against absolutism in Church and State.

FIFTH PERIOD.

THE STUARTS AND THE CONSTITUTIONAL CONFLICT.

CHAPTER XXXVII.

The Discord within the Political System.*

James I., 1603–1625
Charles I., 1625–1649
The Republic, 1649–1660
Charles II., 1660–1685
James II., 1685–1688

The English Reformation had made the monarchy the sole heir of the papacy. Though, with the abolition of the long-dis-

* For the period of the Stuarts, the wealth of sources and literature is so great that only a selection need be given. The Statutes of the Realm, vol. iv. a, v., vi., vii. a., contain the legal records of this period. For the period of the Commonwealth as supplementary to these: "Acts and Ordinances during the Usurpation from 1640–1656," by Henry Scobell (London, 1658 fol.). The Parliamentary proceedings are given in fairly detailed extracts in Parry, "Parliaments," pp. 240–603 (1839). Among the historical descriptions the most prominent is the brilliant description in Macaulay, "History of England." *Cf.* also Hallam, "Const. Hist.," vols. i., ii. For voluminous matter: Rushworth, "Historical Collections from 16 James I. to the Death of Charles I." (1659–1701). The constitutional law questions of the revolution are treated of in Clarendon, "History of the Rebellion" (Oxford, 1705), Brodie, "Constitutional History of the British Empire, from the Accession of Charles I. to the Restoration" (new edit., 1866, 3 vols.). Burnet, "History of his own time from the Restoration," etc. Guizot, "Histoire de la Révolution d' Angleterre," "Historie de la République d' Angleterre," and other writings. Dahlmann, "Englische Revolution." Ranke, "Englische Geschichte," vols. i.–vii., principally dealing with foreign affairs. As to the political polemical writings of Hale, Prynne, Selden, Brady, and others, *cf.* R. von Mohl, "Die Literatur der Staatswissenschaft," vol. i., pp. 325–330; ii. 70 *seq.*, 86 *seq.* *Cf.* also particularly Sir Roger Twysden: "Certain Considerations upon the Government of England," edited by J. M. Kemble (London, 1849, 4to). More modern treatises: J. Langton Lanford, "Illustrations of the great Rebellion" (London, 1858). Vaughan, "Revolutions in English History" (vol. iii. 1863).

puted foreign supremacy of the Italian Head of the Church, an important step had been taken towards the emancipation of the intellect, at the same time a serious step had been taken towards imperilling the national constitution. The contrast which had so long and so deeply moved the Middle Ages had thus become planted in the heart of the constitution. Until the period that now commenced, the boundary between Church and State had been guarded by national jealousy; now the barrier between the two had fallen, for both had become united under a single sovereign lord. The two tendencies of the human mind, which had hitherto embodied themselves in Church and State, had now become internal contrasts in the State itself.

According to the time-honoured popular idea there was only one Church. But the living generation found itself involved in a bitter controversy as to which Church was the true Christian Catholic Church. The possibility of each being equally entitled to be so regarded, or even of a toleration of different creeds within one political system, was as yet quite alien to the ordinary ideas, and was in fact impossible, so long as each Church regarded the right of solemnizing marriages, and all the important bases of private family institutions, as well as public education and numerous other legal conditions of family life as the subject of its exclusive legislation and jurisdiction, subject to the ecclesiastical coercive control, which like every other political power, could only be a concentrated and exclusive power.

The Roman Catholic Church, where she had the power, enforced this view of her right by fire and sword. She had strengthened herself in the sixteenth century by serious reforms and by strong alliances. The Pope, and the Catholic potentates of the Continent, kept up an agitation by means of emissaries, by entering into conspiracies and by releasing the English subjects from all obedience to the English throne and supremacy. Such opponents could not be combated by endurance. The scenes on Saint Bartholomew's day in Paris, and those which took place in the Spanish Netherlands,

made abstract toleration in the sixteenth century an impossibility. The Crown of England was not able to protect and maintain the national Church in any other way than by constituting it the only true, and the sole rightful Church both in the eyes of God and of the law; it could only uphold the greater Christianity of the new faith, by exercising its right of constraint in a more moderate and more human fashion. The attitude of the Crown towards the old Church was thus indisputably established.

But as early as the second half of the sixteenth century, differences began to spring up in another direction within the reforming party itself. The idea of a mere national Church, without change of dogma, had under Bloody Mary been proved to be utterly worthless. The monarchy was obliged to confess that the new work, without inner conviction, had no hold, and that in many parts of the country the reform had not as yet been understood. Therefore, in spite of serious scruples, it had been necessary to resort to the peculiar weapon of the Reformation, the licence to read the Bible. The effect was, that the people began to expound the so long prohibited Bible with that kind of prejudice "with which an English jury is wont to regard evidence, which one party in the action has endeavoured to suppress." With examination and inquiry doubts now arose in individual minds as to the new hierarchy. Simultaneously with the dogmatic reformation under Edward VI., disagreements appear between the more moderate reformers, who are satisfied with the doctrine and liturgy established by authority, and those stricter reformers of the school of Zwingli and Calvin (analogous to the controversial points between the Lutherans and the Reformed Church), and nourished by intercourse with the reformed clergy on the Continent. The Government itself had held up the Roman Church with its external pomp, its miracles, its relics, and its traffic in indulgences to ridicule and scorn. With the permission to read the Bible, there was added to the mistrust of the authorized teachers of the Church the charm of personal research and the national

characteristic of striving after individual independence. Both schools held to the opinion that holy writ was alone sufficient, not only in matters of faith, but also for discipline and the honour of God, and that each individual had a right to interpret the Scriptures independently according to his own lights and his own conscience. But a further result was, that the legality of Convocation, as well as the authority of the *canones*, was disputed, and in this manner opposition was directly introduced into the State. A fruitful soil for this personally honourable opposition was found in the rising classes of the yeomanry, the citizens, and a part of the gentry, but especially in a part of the theologically educated lower clergy. As is ever the case, the ideas of social classes blend with those of the religious, and, according to the degree of influence the latter exercise, dissent takes the form of a Presbyterian constitutional ideal, or inclines into the more thorough-going tenets of the later Puritans, or finally to those of the Independents, who deny the Church as an institution, and desire to make the clergy elective parochial officers, entirely dependent upon their constituents, who elect them. Though these different schools of thought showed themselves in Elizabeth's time only sporadically, and then only in narrow circles, yet they soon manifested themselves in attempts at forming sects and conventicles, in dissensions between the parishes and the authorized parsons, as controversial points between the parishioners among themselves, and yet more particularly in the manifold differences in the externals of the places of worship and in the form of the service.

From the point of view of the State Church, Elizabeth determined to suppress the irregularities in the Church service which resulted from these causes, to take action against the conventicles, to depose dissenting ministers, and to visit the issue of polemic pamphlets with severe penalties. But, through this course of action, honest conviction was driven into opposition against the royal authority itself; Cartwright, in his bold theses, even disputed the supremacy. "Church matters should," he urged, "only be settled by

Church officials and ecclesiastics, entitled, even without the consent of the magistrates, to adopt ecclesiastical ordinances and ceremonies." This opposition was surely not unwarranted, in a work of reformation, which was so external in its starting points, and had remained so long external in its course, as the English Reformation. Elizabeth, however, in thus checking it, followed her religious conviction and her policy. In the deep attachment of the people to her person and in the triviality of the differences between the essential doctrines of faith, this side of the opposition still appears the subordinate one. (1)

But in spite of continual disunion among themselves, the reforming schools remained united in their demand for the creation of a national Church, that is, united in their opposition to the "papists," who were now regarded by the national jealousy in the light of treasonable subjects, who cleaved to a foreign ruler. How Parliament would have acted if left to itself, is shown by certain acts of violence and by ceaseless complaints concerning the leniency shown to papistry. The Crown, by legislation and administration, did its best to suppress the remains of Catholicism; yet from Elizabeth to James II. there was no single time at which the Crown granted as much as Parliament and the popular voice really demanded. All clamoured for coercive measures. In the eyes of the Presbyterians the persecution

(1) The attitude of the monarchy towards the Protestant opposition has not, in historical descriptions, been sufficiently valued according to the scale of the times. Modern tolerance and latitudinarianism would have made the English national Church defenceless and helpless in a conflict with the Roman ascendancy. Unity in its outward organization cannot be dispensed with by a church, even though it be restricted by the executive power of the State to the sphere of an ecclesiastical school and cure of souls. But after the Roman Universal Church had become an exclusive political system, far beyond these limits, ecclesiastical reform could only find its support in an effectual ecclesiastical authority and in church property, and not in the purely internal nature of the "Church of the early centuries," which the puritan opposition took as a model. Upon the Continent also the Reformation was compelled to pass from the internal impulse of the heart to external institutions, varying according to the form of the existing temporal state, but ever in close connection with it. Between both one-sided tendencies Elizabeth sought a balance, which actually preserved both Church and State for more than a century from a renewal of a violent struggle.

of the Catholics was not sharp enough; the Episcopalians demanded greater severity against both. All approved such excesses of the Government as were directed against the other party.

In this department of political activity it first became manifest, that the Crown had by the Reformation gained a new independent position, and that its supremacy had altered the character of the prerogative, just as in Germany the position of the reigning potentates had become altered by the so-called *jus reformandi*. In the province of the Church, the King rules as absolute monarch, with a bureaucracy; in the province of the temporal power, on the other hand, only as a constitutional authority, with enacting Parliaments and independent *communitates*. Both systems were in daily contact with each other. But a power that ruled with unlimited sway in what had hitherto been the higher sphere of the Church, felt a natural desire not to be bound in the temporal sphere by the resolutions of the Lords and Commons. As every political power bears within itself a tendency to develop into absolutism, so the monarchy thus gained an inevitable tendency to transform the State into an administrative system after the pattern of the Church.

With clearness and decision Elizabeth had taken up her position under these circumstances. Her government, with the assistance of her council, continually draws conclusions from the royal supremacy. The Act of Supremacy declares all ecclesiastical legislation and jurisdiction to be an emanation from the Crown; the ecclesiastical oath of allegiance uniformly embraces all ecclesiastical and temporal persons holding any public office, down even to the lower and indirect officials and servants of the state. The Act of Uniformity subordinates ritual and Church discipline to the regal power. Later legislation endeavours by supplementary measures to crush rising opposition at all points where it shows itself. (1[a])

(1[a]) Whether Elizabeth acted rightly in keeping down with such rigour, by her injunctions, the loyal opposition which in the doctrines of faith was arrayed on the side of the national Church,—whether a certain amount of

These measures continued to be employed with greater rigour against the opposition on both sides; often severe towards individuals, yet without violating the formal law, which even in the proceedings against Mary Stuart, that were purely determined by political motives, was on Elizabeth's side. With the same sagacity Elizabeth kept within the constitutional limits of her royal power. She knew that her military, judicial, police, and financial sovereignty could no longer be severed from the legally acquired and constitutional participation of the propertied classes; she never ignored the fact that her own title to the Crown was dependent upon secular law and upon the recognition of Parliament. The divine mission of the monarchy, of which she was deeply convinced and fond of speaking, she considered as perfectly compatible with it. With the due recognition of the position and influence of Parliament, she united the newly acquired rights in such a fashion, that (1) in the legislation

conciliation with regard to the moderate proposals of the Lower House in 1584 would not in some measure have calmed down the dispute,—on these points the opinions of her own ministers were divided. The experiences made in Scotland were not, however, of a kind to recommend a mild ecclesiastical system of government as productive of peace and concord. In dissenting circles themselves the sturdy manly struggle against error was regarded as inseparable from the serious conviction of the truth. Still less could the powerful opposition made by the Roman Catholic Church be ignored, which, by means of the Jesuit system, had brought about a great alliance of Catholic princes. The necessity for an external union of the English Church was accordingly in no way denied even from this side. What the opposition demanded was not tolerance, but the exclusive acknowledgment of their ideal of church establishment, and having attained this acknowledgment, it demanded uniformity just as much as the national Church. A remarkable expression of the highest views of the time is found in Hooker's work ("Ecclesiastical Polity," 1594), which is quoted in Hallam. Even Cartwright, in his violent opposition to the national Church, demands that the authorities shall punish atheists and papists if they refuse to participate in the true preaching of God's word. Had Elizabeth given free scope to the dissent of those times, there would beyond doubt have resulted only a divided and still more intolerant church system; a "church of the apostolic era," with still more rigorous principles touching discipline and ritual. Later results have only too completely confirmed this. Elizabeth was not wrong in replying to the Emperor Ferdinand "that she could not grant ecclesiastical toleration to those who disagreed with her religion, being against the laws of her Parliament, and highly dangerous to the state of her kingdom, as it would sow various opinions in the nation, and would cherish parties and factions that might disturb the present tranquillity of the commonwealth." A generation was at least yet required, after the events under Mary, to give the State Church the requisite stability in the institutions of England and the customs of the people.

affecting internal ecclesiastical affairs, she claimed the exclusive initiative for herself and her clergy; (2) she caused the enlarged administrative powers, which the ecclesiastical conflict had called forth, to be sanctioned by acts of Parliament; and (3) in circumstances of war or national disorder she granted extraordinary powers by ordinances, and also granted her officers dispensation from the existing laws. But she made a very moderate use of these powers in cases, for which even the Parliaments of the eighteenth century would not have refused an indemnity bill. She justified reservation to herself of the initiative in the legislation touching internal Church matters, by saying that changes in matters of faith ought not to be brought about by resolutions of the majority, and that Parliament had no traditional rights to claim in this province.

But it lay in the nature of this political government, that such a position did not satisfy many views and interests among the immediate surroundings of the Crown. In the Privy Council, even under Elizabeth, a notion had already gained ground that, in addition to the ordinary prerogative of the Queen, there existed also a "supreme sovereignty," which was also called the absolute power, and from which was primarily derived the legality of extraordinary measures in extraordinary difficulties. The professional bureaucracy was only too ready to look upon every impediment to a government measure as a "difficulty," which could be redressed by the "supreme sovereignty." Proceeding to still greater lengths such conceptions took root among the clerical officials of the State Church of the time. The new position of the bishops as delegates of the royal power had lost its independence as an estate. Their highest court, the Court of High Commission, had become purely a body of functionaries, without either the concurrent enacting powers or the control of an estate, with an ordinary criminal and disciplinary jurisdiction, which is acted and re-acted upon by the machinery of the Star Chamber. The system of these bureaucratic bodies extended still further into great provincial councils.

All these courts had adopted the administrative forms and maxims of their ecclesiastical model, that is, of the pure bureaucratic system. It was natural that within this administration new legal conceptions should be formed. Whilst in Germany the modern bureaucracy was the outcome of new legal doctrines, so here new legal conceptions emanated from the already existing official bodies. They coincided with the old jealousy between Parliament and clergy and with the justifiable aversion of the clergy to be subordinated to Parliament, with its varying party-majorities. Through the daily contact of the spiritual and temporal administration, the conceptions of the authority of a spiritual ruler were involuntarily transferred to his attitude towards Parliament and the laity. Whilst the era of the Middle Ages had formed its constitutions not by reflection, but according to the sense of right and interests and by tradition, here for the first time, theoretical systems of the royal right arise, which are formed pre-eminently from theological views and theological polemics. The assemblies of the clergy in both Houses of Convocation, became from this time forth the centre of political doctrines of absolutism. After a few decades the clerical conceptions were consolidated in the *canones* of the Convocation of 1606, which, however, were not yet published. These theses go back to the origin of human government, which they look for in the patriarchal rule over the family as it appears in the Old Testament. "In those golden days," it was said "the functions of the king and priest were the true prerogatives of the right of birth; until the wickedness of men brought in usurpation and so troubled the clear stream from its sources with foul admixtures, that we must now seek in prescription the right we can no longer ascribe to birth." Deriving thence the doctrine of unconditional obedience to the King's ordinances, it proceeds, "The King's power is therefore from God, that of Parliament from men, gained perhaps by rebellion; but what right can arise from rebellion? Or even if it had arisen from voluntary concession, could the King dispose of a gift of God and break the disposition of Provi-

dence? Could his grants, though not void in themselves, be valid as against his posterity—heirs like himself of the great gifts of Creation?" (2)

The fate of the monarchy and the national constitution depended upon the attitude which the dynasty, that came in with the seventeenth century, adopted with reference to these

(2) The new High Church political theories are directly the reverse of the puritan opposition. Henry and Elizabeth had retained the episcopal dignity, not as a sacred *ordo*, but as the ordinary organ of Church government approved by experience. But when the puritan school violently attacked the bishops' authority, the prelates replied by appealing to their "divine appointment." They then followed puritanism into its own territory, by opposing one *jus divinum* to the other, and thus at the same time regained a certain independence from the civil powers. The episcopal office refused to be permanently a mere organ of the civil magistrates. The more the State Church felt itself consolidated the more did its self-respect grow as it remembered the former position of the Church. But the goal was only to be attained by a solidarity subsisting between the divine appointment and the Crown, which latter appointed the bishops. After the accession of the Stuart dynasty to the throne it was perceived that the independence of the Church was less threatened by the Crown than by the Parliaments. The clerical absolutist theory had at all times its roots in the wonted profession of the clergy as instructors. The habit of instructing the laity in spiritual things engenders the desire to impart instruction also in temporal things, in which the layman understands what is law and right quite as well and even better than the cleric. The demand that the executive should be a "Christian authority," is well founded as being a claim that the State is to obey the commandments of Christian morality, which are one and the same for both Churches, and which should be the mainspring of action in the monarch on the throne as in the servants of the State, as members of their Church. But it does not mean that in an eternally recurring confusion, the clerical body of either persuasion, with its interests of power, property, and party, should sway and guide the central government. In this connection those ecclesiastical recommendations are instructive, with which since the rise of Parliaments amid severe party-struggles and revolutionary changes, the great parliamentary sessions were introduced (such as Stubbs reminds us of in the period of the Middle Ages, and Froude in the Tudor era), and which certainly contain the strongest exhortations to the clergy, not to forsake in their political speeches the domain of universal Christian morality, in order to take immediate part in the constitutional questions of the day. If it was made a reproach to the ecclesiastical opposition, that it had a political background, this was true in still greater measure of the clergy of the State Church, in whom solid zeal for the holy Church now became a holy zeal for the secular power of the head of the Church. Similarly in the bureaucracy of the German principalities, we find underlying the exaggerated zeal for the power of the royal lord, a quiet zeal for the enhanced importance of their own rank. The purely absolutist ideas of the royal power appeared manifest in the pamphlets of the times immediately after James the First's accession to the throne (*cf.* Cowell's Interpreter, 1607, under the head of *King*). The great indignation, which arose in consequence in Parliament, was calmed by an ordinance of James I., which prohibited this pamphlet. As to the progress of these absolutist theories of the clergy after another generation, *cf.* the *canones* of 1640, and the treatise of Filmer (*infra* 238, note).

new theories. As the English Reformation had passed from external institutions into the hearts of men, the intellectual conflict of Puritanism with the High Church system, and the struggle of the High Church system with Puritanism were destined to return to do battle in the temporal State. The Stuarts, by taking part with one extreme, themselves drove the other side to resistance, until the King's rule was overthrown. The Reformation began in England in the sixteenth century with an external alteration of the ecclesiastical constitution; it concluded in the seventeenth century with an alteration in the political constitution. The controversy touching the fundamental doctrines of Christianity (such as transubstantiation) had never in England been very bitter. The strife was more heated as to the liturgy and ceremonial. In a fiery form and with a tendency towards violence, it maintained itself in questions touching constitution and power, where the self-government of the Church and the parish clashes with the supremacy and the Court of High Commission, and where the general priesthood opposes the bishops. The English people also have not been exempt from a doctrinal civil war; but the State Church is finally indebted to the passionate violence of the sects for the completion of her internal life, which, in the German Reformation, existed from the outset.

CHAPTER XXXVIII.

The Conflict of the Jure Divino Monarchy with the Estates.

In this critical state of affairs the house of Stuart ascended the throne, at a time when, upon the Continent, parliamentary constitutions were everywhere coming to an end. That the same result was averted in England is attributable not to the personal character of the Stuarts, and not to the absence of a standing army, but to the legal equality and cohesion of the estates, to self-government, and to the whole substructure of the English constitution. In France, the monarchic power had by its personal influence first to create a "state" and a "nation." In Germany, it was the task of the absolute potentates to blend the several class privileges together into a bare unity. In both countries, the history and the greatness of the monarchy was identical with the struggle against the landed nobility which in England had been already decided in the Norman period. In the lower stage of her development in the eleventh and twelfth centuries, England had passed through the necessary transition period of the absolute State. The strengthening of the royal power under the Tudors was brought about solely by the confusion of the fifteenth century, and was destined only to carry out the national task of the Reformation. After the discharge of this mission, the English monarchy was and remained still a power in itself. It still remained the necessary presupposition of the constitution, the hereditary bearer of the supreme magisterial power, the source of all the privileges of

the higher classes; with great duties as the patron of the rising peasantry and the towns, and with still greater duties for raising the labouring classes and the intellectual life, and in the foreign department entrusted with the great duty of intervention for the imperilled Protestant cause in Europe.

But the royal family of the Stuarts had no innate feeling for any of these several duties. Till their time, the history of England had shown the monarchic power almost from generation to generation alternately ascending and descending; now the descending tendency is seen throughout a whole dynasty, during a period of three generations. Scarcely any family of rulers ever sat on the throne that showed itself so entirely devoid of all sense of royal duty. Their views and mode of action had practically nothing in common with the character of the English monarchy and the English people, but belong to the domestic policy of the family of the Guises and the religious controversies of Scotland. The Stuarts cared no longer for the glory and the greatness of their country, for the victory of the established faith of the nation, for the protection of the traditional common law, nor for the relief and advancement of the weaker classes—but only for the satisfaction of their dynastic will. All aims of this royal race both externally and internally are mistaken. The representation of Protestantism in the great struggle of the century was their external task; but the Stuarts first neglected, and finally disowned it. The reconciliation of the claims of the clerical profession with the opposing spirit of self-government, the strengthening of the national Church, while yet maintaining tolerance towards other creeds, was the internal task which the Stuarts persistently perverted. England had, as a fact, become the antipodes of the whole Roman system. Its European position unequivocally pointed to an energetic development of its maritime power and to a vigorous championship of the cause of the Reformation. Instead of this, James I. became entangled in the net of intrigues of the Continental courts, which was of only secondary importance for England, a net which ought to have been torn asunder by an honest

championship of the Reformation. The pedantic perverseness of James I. and the aimlessness of Charles I., could not fail to injure and embitter their relation to their Parliaments. In spite of all the difference in their characters, a negative trait pervades the reigns of all the Stuart kings; it is the want of appreciation of, and respect for, the law of the land. No one of them ever felt himself as representing "England," as identified with the honour, the rights, and the interests of the country. Even their religious convictions were not manifested in a sincere attachment to their national Church, in faithful observance of the oaths they had taken, nor in the exercise of any Christian duty of pardon and grace; but only as controversial weapons for establishing their dynastic pretensions. The Church in their eyes is only a source of regal influence. Their pretended attachment to the nobility of the country merely displays itself in a money traffic for peerages and titles. All noble and systematic provision for the relief of the poor, for education and the advancement of the welfare of the lower classes, all generous encouragement of talent and the sciences ceases with the Stuarts. And if we add to this their want of talent as military leaders, their incapacity to enter upon any great and permanent political combination, it will be easy to understand how it was possible, in less than a century to destroy the belief of the nation in the kingly office.*

* The dynastic character of the reign of the Stuarts is unmistakably traceable to their origin. "In the princes of the house of Stuart we see little of the sober Gothic honesty of the lowland Scot, much of the vanity, unsteadiness and insincerity natural to the Italian and Gallic stock from which they came" (Vaughan, iii. 13). In their later domestic policy, which wavered between Spanish and French alliances, it is perhaps most of all their genealogical vanity which makes them swerve from the natural alliance with the Protestant houses. Their attitude with regard to theological questions, was in the first generation determined by the embittered character of the Scotch Reformation. Their later leaning towards Catholicism was in great measure brought about by female influence resulting from their constant alliance with Catholic houses. But the real reason, which caused historians and politicians of every shade of opinion to side against the Stuarts, is the systematic perversion of the monarchical principle in their hands. It is a point often overlooked, that many of their measures were more in harmony with the letter of the law than is assumed according to the standpoint of the present constitution—not unheard of pretentions, but an advance upon the road which the Tudors had trodden. But whilst the Tudors acted in a dictatorial manner in the full consciousness of their royal duties, the Stuarts insist on enforcing their personal will out of mere idle egotism.

The first stage in the beginning of the struggle is certainly more like one of those comic scenes, such as in the dramatic masterpieces of Shakespeare precede a tragic issue. In James I. a learned pedant had ascended the throne, unkingly in bearing, manners, and speech, one who seemed to regard the proceedings in the Church and in Parliament as mere rhetorical exercises, in which absolute supreme sovereignty should be taught to unbelievers by ratiocination;—and withal timidly retiring before the first signs of serious resistance, and sacrificing his ministers to the vengeance of Parliament. His whole reign is a weak succession of protests, which did not prevent Parliament from re-establishing the right of impeaching the officers of the Crown, declaring monopolies illegal, and enforcing in the Lower House their own decision respecting elections.**

But what James the First's "kingcraft" failed to accomplish, led to a decisive struggle under Charles I. The encroachments of the *jure divino* monarchy, are all directed simultaneously to the one practical and decisive point, the abolition of the parliamentary grants of subsidies. These periodical money grants presupposed a constant understanding between the Crown and Parliament touching acts of legislation and foreign policy, with which an absolute monarchy was quite incompatible. The opposition of his first two Parliaments, and their refusal to grant subsidies, was met by Charles I. by prompt dissolution, and by the issue of ordinances to intimidate the opposition. The Star Chamber is made use of for compulsory

** James I. was possessed of the genealogical crochet which induced the son of Mary Stuart and Darnley to believe that he united in his person the hereditary monarchy of the Anglo-Saxon dynasty, the Norman kings, the Plantagenets, and the Tudors. Much as his aversion to Puritanism and the insipid theological controversies of the period, which resulted from the Scotch religious conflicts, may tell in his favour, yet the decidedly unkingly bearing of this monarch ultimately tended to shake the royal authority. The learning which is displayed in his writings, as in the "Basilicon Doron" (intended for his son), in his works upon sorcery, the exorcism of devils, etc., an unmistakable penetration, almost cunning, and at the same time a want of sound judgment as to the affairs which surrounded him, form a marvellously confused character in this curious man, whom his admirers called "The British Solomon," and whom the Duc de Sully designated "the wisest fool in Europe."

loans, which were moreover extorted by compulsory billeting of soldiers, the forcible pressing of sailors, and arbitrary arrests. The increasing opposition has, however, soon reached the stage at which intimidation is no longer effectual. The King is compelled by pecuniary necessity to summon a third Parliament, and in this is constrained by the united opposition of both Houses to acknowledge the "Petition of Right," and to approve the declaratory statute (3 Charles I. c. 1), which pronounces all forced loans, arbitrary arrests, and proceedings by martial law as unlawful both in the past and for the future.*** Up to this point the conflict has retained the character of former periods; administrative abuses and national grievances still continue in the grooves of the old struggles between the monarchy and Parliament.

But the King, with the intention of not keeping his word, after obtaining his subsidy, dissolved Parliament, firmly resolved never again to convene a Parliament. "Ashamed that his cousins of France and Spain should have accomplished a work which he had scarcely begun," he commenced, from March, 1629, a system of personal government, quite new to England, a system which deliberately attacks the foundations of the parliamentary constitution, and introduces new departures into the ecclesiastical and temporal administration, with the fixed purpose of systematically destroying them. The three weapons ready to hand were, the royal ecclesiastical government, the Privy Council, and the appointment of law officers.

1. *The royal ecclesiastical government* had placed the appointment of the supreme ecclesiastial tribunal and of the bishops in the hands of the King for the maintenance of the national Church in the form recognized by Act of Parlia-

*** The four points of the Petition of Right are: (1) That no freeman shall be compelled to pay any gift, loan, benevolence or tax, without the consent of the representatives of the nation as declared by acts of Parliament; (2) that no freeman shall be imprisoned or arrested contrary to the law of the land; (3) that soldiers or sailors shall not be quartered upon private houses; (4) that certain regulations touching the punishment of soldiers and sailors according to martial law shall be repealed, and such shall not be issued for the future.

ment. Under James I. the time had arrived when the Church stood no longer in need of that over-rigorous uniformity which, under Elizabeth, had appeared essential to its stability. James I. did not attempt to disguise his idea that the institution of bishops and the episcopal power were pre-eminently designed to accustom subjects to the obedience they owed to their sovereign and to keep them steadfast in it. Charles I., although a Protestant in his personal belief, imagined that he could achieve the development of his spiritual supremacy into temporal absolutism most readily by a return to the standard doctrines and forms of the Roman Catholic hierarchy. This was the object of the Catholicizing reforms of Archbishop Laud, the return to the doctrine of transubstantiation in an ambiguous phraseology, auricular confession, preference of unmarried to married priests, revival of picture-worship, of the crucifix, of gorgeous vestments, of the sacramental altar, and of genuflexions, combined with intolerable vexation and persecution of the puritan sects. By the systematic appointment of men of this tendency to the high places in the Church, the royalist hierarchy and the ecclesiastical spirit of caste was carried to the pitch which is aptly expressed by the *canones* of the Convocation of 1640. (1)

(1) The perversion of ecclesiastical government to political purposes is expressed in James's motto: "No bishop, no King." From the year 1595 the dissenting body had become known under the party name of Sabbatarians, and under James I. the sects had attained considerable proportions. Still, however, a consciousness of a fundamental schism in the political system as a whole did not exist. The collision of the two systems took place in more special departments, particularly in the increasing complaints of the ecclesiastical party as to the frequent interference of the temporal courts with ecclesiastical jurisdiction by means of prohibitions. In 1616 the conflict arose between the Equity Courts of the Chancellor and the courts of common law. In this period the conflict became a class struggle between the clergy and the lawyers. Under Charles I., on the other hand, the ecclesiastical power no longer serves the Reformation, but the extension of royal powers against the Parliament. The Church, which under Archbishop Laud had become Arminian, became the instrument for extending at once the power of the King and of the clergy. The increasing rigour of the Court of High Commission, the persistent persecution of the Puritans, engendered that amount of bitterness which in the course of the civil war bursts forth in this direction. It would seem a special intervention of Providence that in every constitutional conflict it is the most extreme party that is destined to undertake the formation of a counter party. In that most disastrous moment when Charles I. on the 5th of May, 1640, dissolved the moderate "Short Parliament," the ecclesiastics remained assembled to enact those *canones* which

2. *The Privy Council* was destined to sit *in banco*, and with the assistance of the common law judges to conduct the highest business of Government according to the laws of the land, and to supplement these laws in all discretionary points, where the exercise of the sovereign rights was not determined by law, so as to do justice to the extraordinary needs of the State and of society. For the Stuarts these discretionary powers were the fulcrum by which the constitution was to be lifted off its hinges. With this idea the ministers from Buckingham to Strafford proceed in an increasing scale until the utterly unprincipled tyranny, and insolent trampling down of the laws of the land, which characterizes the renegade policy of Strafford is reached. As the domestic policy of the dynasty met with a conceivable impediment in the corporate nature, in the deliberate procedure of the council, and in its legal advisers, James I. had begun to thrust the troublesome apparatus on one side by discharging State business in the King's "cabinet," that is, in small confidential sittings, in which the counsels of the courtiers (his immediate companions) at once became of more paramount influence than those of the responsible ministers. It is the body thus constituted that now, under the name of a royal council, exercises the discretionary powers of the "Star Chamber," powers which had been created for quite different, for legitimate and honourable ends. From this starting-point proceed the police measures, which were necessary for the new system of rule, and which as the opposition increased, became a complete system of banishments, house searchings, seizures, and refusal of the *habeas corpus*. From this centre that method of govern-

declare "every assertion of an independent co-active power besides the royal power to be high treason." The real standard of the High Church theories, however, was just at this time the pamphlet of Filmer, "Patriarcha," which was regarded as the keystone of the system. All government, he urges, is absolute monarchy. No man is born free, and in consequence no one can have had the liberty to choose a ruler or a form of government. The *paterfamilias* rules according to no other laws than his own. Kings succeed by right of their parents to the exercise of the highest jurisdiction. They are above all law. They have a divine right to absolute power, and are not responsible to any human authority. It was, however, considered advisable not to issue this pamphlet in print until after the Restoration.

ment was developed, which, to use Clarendon's expression, "commands by ordinances what was not commanded by law; forbids what was not forbidden by law, and then again punishes disobedience to the ordinances by heavy fines and imprisonment." (2)

3. *The selection of law officers by royal appointment* from among the leaders of the legal profession was intended to render the administration of the permanent part of the legal system independent of the temporary political system. This royal right had hitherto been exercised in such a dignified and impartial manner, that all the dynastic changes of the fifteenth century, and all the religious changes of the sixteenth century passed by without any change in the nature of the judicial body. Under James I., political motives, for the first time, dictate the dismissal of a Lord Chief Justice (Sir Edward Coke), and a shameless system of the sale of judicial offices appears, which shakes the honourable character the bench had gained under the Tudors. Under Charles I. this appointment to the judicial offices becomes a political system. As early as the year 1626, Chief Justice Crewe was dismissed for refusal to acknowledge the legality of enforced loans; in 1630 the Chief Baron, Walter, was suspended because he disputed the legality of a proceeding taken against members of Parliament on account of acts and speeches in the House; in 1634, Sir Robert Heath was similarly treated for his opposition to the ship-money and to Archbishop Laud. His place was taken by Chief Justice Finch, a man on whom the

(2) The transformation of the Privy Council is the outcome of a systematic combination of the right of issuing ordinances with administrative coercion. In fact a new legislation has been created which does not concur with but destructively opposes the legislation of the country and the parliamentary constitution. The state of affairs which existed in the Norman period returns, in which the royal power of inflicting police fines by amerciaments actually leads to a legislative power. The ordinance which decrees the ship-money proceeds from the council. Financial sagacity revives even the old-fashioned fines for failure to take up the honour of knighthood, and the old forest laws themselves in order to open up new sources of revenue. In contravention of the statute of James I. monopolies were made a new source of income, as was also the incorporation of the wealthiest trades into guilds. The ordinances even invaded purely private rights, by pulling down houses and shutting up shops for the purpose of embellishing the surroundings of St. Paul's Cathedral.

court could depend. The small number of judicial offices which were of consequence were filled with "men of confidence" in such a way, that the time soon came in which no constitutional principle and no law could be upheld when subjected to the interpretation of the judges holding office. In the counties, the appointment of the sheriffs and the formation of the commissions of justices of the peace was conducted on an analogous system. (3)

With this apparatus of coercive measures, Charles I. now set himself to abolish the three fundamental rights of Parliament, which stood in his way.

The chief point was the *abolition of the financial rights of Parliament.* James I. had attempted to apply his theory of supreme sovereignty to the imposition of new taxes, but had afterwards given way. This attack was now again seriously renewed with that ship-money, which has become world-renowned. Former kings, relying on their military sovereignty, had, occasionally in time of war, raised contribu-

(3) The perversion of the position of the courts of justice begins as a dynastic feature contemporaneously with the accession of the Stuarts. James I. declared to his judges that he would himself decide legal questions, as he had been told that law depended upon reason, and he was as well furnished with reason as his judges. He often insisted upon a personal conference with the judges before they passed judgment—"auricular taking of opinions," as Lord Coke described it. Among his advisers there were even at that time supporters of the supreme sovereignty, who advised him to make an example of a judge for his audacity, by which the whole body would be kept in wholesome dread. One of these was the same Lord Bacon, who afterwards urged the deposition of Chief Justice Coke "as a kind of discipline, because he had opposed the interests of the King, which example would keep the others more in dread." Ellesmere was directed to postpone an action against an accused individual, "because he has shown himself in the House of Parliament very zealous in our service" (Foss, vi. 2). Under James the principles were, however, always worse than their application, for which both courage and consistency were lacking. The shameless sale of judicial appointments, as those of the Attorney-General and the serjeants, for which sums of £10,000, £4000, and the like, were offered and accepted, was most pernicious (Foss, vi. 3). Under Charles I. the "strong rule" begins in this department. Not the laws of the land, but the personal will of the King was to be the rule of the courts. Thus came about the inconsiderate dismissal and suspension of the opposing judges, the appointment of "men of confidence" to the small number of important offices; for instance, Sir John Finch, on account of his approved behaviour as speaker of the Lower House, was appointed to the office of Lord Chief Justice. On the occasion of the granting of the Petition of Right, the justices who were privately consulted were of opinion that the bill might be allowed to pass, and the Government continue the same practices as heretofore!

tions in money for the defence of the coasts of coast-counties. These were now made use of, in a time of peace, for the imposition of a money contribution upon all coast and inland counties, which was to be levied by the King in council, distributed among the counties and cities, and employed for the general purposes of State. It was required to raise a round sum of £200,000 in taxes, which amounted to quite as much as the subsidies that were ordinarily granted. The way was paved by the unanimous opinion of the twelve judges being previously obtained, and afterwards, when the case had, by Hampden's refusal, been brought to a judicial decision, a majority of the judges again declared for the legality of the tax, even *in judicando*. This was the centre of the attacks upon the constitution of Parliament and the turning-point of the constitutional conflict, because it proved to the meanest understanding the latest tendency of the Government, and the systematic corruption of the courts. Even that high royalist, Lord Clarendon, expresses himself upon this point as follows: "But when they saw in a court of law (that law that gave them a title to and possession of all that they had) reason of State urged as elements of law, judges as sharp-sighted as secretaries of State, and in the mysteries of State; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof; and no reason given for the payment of the thirty shillings in question, but what included the estates of the standers-by; they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds. And here the damage and mischief cannot be expressed that the Crown and State sustained by the deserved reproach and infamy that attended the judges; there being no possibility to preserve the dignity, reverence, and estimation of the laws themselves, but by the integrity and innocency of the judges." After this judgment the moneys that were still needed were raised by supplementary ordinances. (*a*)

(*a*) The principal service which was demanded from the judges in the constitutional struggle was the recognition of the legality of ship-money. The

The legislative power of Parliament had its vulnerable point in the loosely defined province of the ordinances (p. 186), which form binding administrative rules, not indeed in contradiction to parliamentary statutes, yet co-ordinate with them. But so soon as Parliament was no longer convened, and an administrative executive was formed by the Star Chamber, every barrier was broken down. The police and financial measures of the Government were now carried still further by a progressive chain of ordinances, which fix the prices of provisions, regulate the incorporation of merchants and traders on payment of large sums of money, and open up other sources of revenue; they are supplemented in this matter by the police system of arrests and banishments. The unreasonably severe fines inflicted by the Star Chamber

twelve judges were first of all assembled under Sir John Finch, and (according to their own statements) were, under threats and promises, induced to deliver the opinion "that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, his Majesty might, by writ under the great seal, command all his subjects, at their charge, to provide and furnish such number of ships, with men, munition, and victuals, and for such time as he should think fit, for the defence and safety of the kingdom; and that by law he might compel the doing thereof, in case of refusal and refractoriness; and that he was the sole judge both of the danger, and when and how the same was to be prevented and avoided." Only two judges dissented, but they were at last induced to sign the judgment. These judges were informed by Lord Wentworth "that it was the greatest service that the legal profession had rendered the Crown during this period." By a royal order, under the great seal, the sheriffs were instructed to burden every county with the duty of providing a ship. The county of Bucks, for example, in which Hampden resided, has to furnish a ship of war of 450 tons, with 180 men, cannons, powder, double rigging, provisions, and all necessaries. This ship is to be brought to Portsmouth by a certain day, and from that time on for twenty-six weeks to be kept in provisions, pay, and all necessaries, at the expense of the county. But as no such equipment of a ship was really intended, the sheriff was further ordered, with the assistance of the mayors, to assess the requisite moneys upon the several freeholders and burgesses, and to hand in the assessment lists. In cases where payment is refused execution was ordered and carried out with the greatest rigour. The mass of the population submitted to the violent measures of the Star Chamber. Only John Hampden, by refusing to pay the tax, brings the question to an issue before the courts of common law, this time before the full bench of Exchequer Chamber. In giving their decision in this judicial case the judges felt some scruples; for fully three months they considered and argued the matter. Finally, seven judges gave their decision in favour of the Crown, while Croke and Hutton decided the principle in Hampden's favour, and the remaining three judges sided with the latter for formal reasons. The moral effect of this event was decisive as to the course of the civil war. The history of the ship-money is told in detail in Rushworth, ii. 335, 344, 352, 364, 453, 480–605, 727, 975, 985, 991, 1395, and App., 159–225, etc.; *cf.* Hallam, ii. c. 8.

became also an immediate source of revenue. The system of ordinances directed against refusals to pay illegal taxes, against unfavourable verdicts of juries, and against unfavourably regarded members of Parliament, combined with the Star Chamber, silences for a time all opposition. (*b*)

The right of controlling the executive, and the right of impeaching ministers, was at length simply got rid of by not summoning a Parliament. To the other errors of Charles I. was added an entire failure to appreciate the elements of resistance. At court least of all was the decisive weight which the Commons now threw into the balance of political power understood. The history of England could till that time show no instance of any great movement which had emanated from the Lower House. Both corporately and individually the commons only appeared to the royal Government as elements of a second order, whose perversity could be silenced by simple means. As a blow for the intimidation of the opposition, at the close of the third Parliament, a judicial action was commenced against Sir John Elliot and two other members of Parliament on account of their speeches in Parliament, after the judges had been previously summoned together by a royal cabinet missive to give their opinion upon the questions of the Attorney-General relating to the case. In consequence of this opinion, information was laid in the King's Bench, which ended with a condemnation by the same court to a heavy fine and imprisonment. Elliot died in prison. (*c*)

(*b*) The illegal ordinances were enforced by the penal decrees of the Star Chamber, by arrests and police constraint. Besides fines and imprisonment the Star Chamber now decreed the pillory, corporal punishment, and cutting off the ears. Only sentences of death and confiscations were reserved to the ordinary courts of justice. The penal jurisdiction of the Star Chamber is, however, also an immediate source of revenue through pecuniary fines of £20,000, £10,000, and £5000, which are now ordinary phenomena. The total amount of them was computed by contemporaries at the incredible sum of £6,000,000 (Rushworth, ii. 219). Fifty thousand emigrants left their native land in consequence of this oppression. The King and Archbishop Laud only found in this a matter for regret because ecclesiastical discipline could not pursue the emigrants. An ordinance prohibited further emigration.

(*c*) Next in importance to the judgments in Hampden's case it was the previously delivered judgment of the King's Bench upon Sir John Elliot, Denzil Holles, and Benjamin Valentine, on account of their speeches in the

The principal author and adviser of this new "vigorous" government was, next to Archbishop Laud, pre-eminently Wentworth, Earl of Strafford, who with the fiery zeal of the political renegade, and with his motto, "thorough," applied to England those principles that had been satisfactorily tried in Ireland. By appointing the sheriffs and justices of the peace according to a party system, by corrupting and intimidating the municipal governments by the administrative penal jurisdiction of the Star Chamber, and in urgent cases by the employment of courts-martial, it was hoped to be able to overcome all opposition in the counties. This certainly involved an utter misconception of the substructure of the English constitution, of that union of the military, judicial, police, and financial administration with the county and municipal government. With the legal formation of the national militia, and with the office of magistrate and jury as necessary organs of the courts and the police, a system which presupposed an army of paid military and civil officers entirely dependent upon the Government was impracticable. The increasing opposition of the officers of local government, rendered independent by property, and the want of immediate executive officers, was sure in a very brief period to disarm both coercive administration and enforced taxation. Confronted with the barely organized elements of a standing army, the decayed national militia was yet too powerful to be met on equal terms. Sheriffs and magistrates might be deposed and appointed; but they had still to be taken from the district of the county itself, in which an illegal method of government was felt in quite another way than it would be in a professionally disciplined bureaucracy. It was owing to this cause, that the storm against the parliamentary constitution, which began in the centre, slowly abated in the counties, in which the reliable instruments of despotism were

Lower House, which proved the corruption of the courts in ordinary and everyday legal questions, and with it the cessation of Government according to law (May, "Parl. Practice," i. c. 4). Contemporary writers all unite in remarking that from the moment these judgments were delivered public feeling in the country inclined to decided resistance.

wanting. It was once more the communal system which saved English liberty from being overwhelmed by the despotic administrative system. A quiet but unconquerable opposition lay in the cohesion of the propertied classes, in the strong structure of the English county, and in its now firm union with the municipal and parochial bodies. The resources of the system became exhausted, the necessities of war and the Scotch insurrection forced the King after eleven years once more to call a Parliament; first of all the so-called "Short Parliament," which after a few weeks was frivolously dismissed, but only to make way shortly afterwards for the "Long Parliament" that met on the 3rd of November, 1640.

The measures of the Parliament are directed successively against the specific abuses of the supreme powers, and accordingly assume a retrograde action against the three abused organs of the royal power:—

1. Against the *corruption of the tribunals:* by declaring ship-money illegal, and by cancelling the judgment against Hampden; the judges who had taken part in these doings were put on their trial.†

2. Against the *Privy Council:* Strafford was impeached of high treason, and—characteristic enough of the morality of such a bureaucracy—the twelve judges give a verdict of high treason though the case was doubtful, against the leading minister, to whose bill of attainder and execution, the King also, as cowardly as he was selfish, gave his consent. But, for all future times, the administrative, penal and civil jurisdiction of the Privy Council, as well as all the accessory institutions of the Star Chamber, were swept away by Act of Parliament. The stat. 16 Charles I. c. 10 categorically declares, "that neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority, by English Bill, petition, articles, libel, or any other arbitrary

† The Long Parliament replies to the corruption of justice with an impeachment of high treason against the Lord Keeper Finch and the six judges who took part in the case, one of whom was even arrested upon the judicial bench in Westminster Hall. A like resolution passed in both Houses lays down for the future, that the judges shall be appointed for life, "*quamdiu se bene gesserint.*"

way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of law." To erect a rampart against the abolition of Parliament by systematic refusal to summon the Houses, the so-called *Triennial Act* declared the summoning of a Parliament to be obligatory after an interval of, at most, three years. The vexatious use, which Charles I. made of his prerogative of dissolving Parliament, is replied to by Parliament with the momentous resolution, which declared the present Parliament to be indissoluble without its own consent; even prorogation and adjournment might only take place by Act of Parliament.††

3. Against the *abuse of the ecclesiastical power* was directed the abolition of the Court of High Commission, which was similarly abolished for all time by stat. 16 Charles I. c. 11. This is immediately followed by the impeachment of the twelve bishops. It was further resolved on the first of September, 1642, by the Lower House, *nemine contradicente:* that the

†† There exists no other sanction which public law can employ against an unconstitutional abuse of the right of decreeing, but the impeachment of ministers. The Lower House, accordingly, proceeded as boldly as it did consistently to an impeachment of Archbishop Laud and the Earl of Strafford for high treason. The accusation declared there had been an "attempt to subvert the fundamental laws of the land," and this was consistent with the truth. In the course of the trial a grave doubt arose, whether according to the letter and the application of the laws relating to high treason, such a proceeding fell under the idea of treason against the royal person or not, seeing that everything had been done in pursuance of the order, or at all events with the sanction of the King. In former criminal cases the actual will of the King had been distinguished from the legal will; the first of these had not been a protection to the ministers for the violation of the latter. But the application of the penalty of high treason to cases of this description was quite as novel as the conduct of Charles I. himself. The advice of the servile judges was accordingly obtained, and, without one dissentient voice, their reply ran "that upon the articles of accusation proved against him, Strafford had rightly incurred the penalties of high treason" (Parl. Hist., ii. 757). The condemnation was passed in the Lower House with fifty-nine, and in the Upper House with nineteen dissentient voices. Still more lasting was the energy with which both Houses in accord attacked the pernicious instrument of this mode of government. The abolition of the whole civil and criminal jurisdiction of the Star Chamber and of its imitations, the provincial councils, by stat. 16 Charles I. c. 10 was a decisive step for the whole future of England.

government of the Church by archbishops, bishops, their chancellors and commissioners, deans and chapters, archdeacons, and other ecclesiastical officers, was, by long experience, found to be a great hindrance to the complete reformation and the growth of religion, and a very great hindrance to the State and the Government of the realm, and that the House accordingly resolved to abolish it. Shortly afterwards an ordinance to this effect was issued, and the Church property was sequestrated in favour of the Commonwealth. In due course there follows the condemnation and execution of Archbishop Laud.†††

Charles I. had given way to these strong but consistent measures. The Petition of Right (3 Charles I.), and the statutes 16 Charles I. have, in actual fact, the importance of a second Magna Charta. The constitutional struggle had now reached a stage which in the Middle Ages was usually concluded with a treaty of peace, with solemn compacts on oath under the guarantee of the Church. But it was soon manifest that a compact of this description to suit both sides could no longer be obtained. The dissensions between the King and the Parliament become more and more intense. The ill-considered attempt of the King to arrest in person five members of the opposition in the Lower House, and the dispute as to the command of the militia, give the signal at the commencement of the year 1642 for both parties to appeal to arms.*

††† The Long Parliament replied to the resolutions of the convocations first of all with the stat. 16 Charles I. c. 11, by which the Court of High Commission was abolished with the proviso, that no new court might be instituted with like powers, jurisdiction, or authority, and that all patents to this end were to be null and void. The Lower House declared the objectionable *canones* null and void, and not even binding upon the clergy, and impeached Archbishop Laud, and subsequently the twelve bishops. The feeling in this direction is evident from the unanimity of the resolution, which was passed with one dissentient, who proposed to send the bishops to a madhouse. By a resolution of the 21st of February, 1642, the twelve bishops were condemned to lose their temporal and spiritual estates, and to be imprisoned for life.

* The "History of the Long Parliament," which has been handed down to us by the contemporary writer and parliamentary secretary, T. May ("History of the Long Parliament") has been republished (London, 1854); *cf.* Parry, "Parliaments," pp. 340–533. The eventful Long Parliament of the 3rd of November, 1649, consisted of 480 members of the Lower

In the civil war which now began some accident gave special prominence to the two party-names, "cavaliers" and "roundheads." Nobles, knights, burgesses, and peasants divide into two camps, analogous to the English constitution, the elements of which had now come into collision with each other. On the side of the King are enlisted the majority of the nobles and the great gentry, partly from conviction and partly for the sake of honour; on the side of the Parliament the majority of the prosperous industrial towns and of the free peasantry, led on sometimes by lords, and sometimes by men of the old landed gentry, as Hampden, Digges, Vane, etc., who, according to the titular system of the Continent, would have borne high titles of nobility, or who like Blake, Bradshaw, and Cromwell, at least belonged to good families. The rank and file on each side consisted of the national militia similarly divided. The ruling classes had thus become cleft asunder, each party still inclined for compromise; the Cavaliers frequently negotiating even without the King's consent. On both sides the war was honourably waged, with conscien-

House for England, and 24 for Wales. To the Upper House had been summoned one duke, one marquis, 63 earls, five viscounts, 54 barons, two archbishops, and 24 bishops. The Lower House was one of the wealthiest and most brilliant assemblies that England had until then seen. Charles once more attempted the tactics of flattering compliance, but his words inspired no confidence. The reaction could therefore find no support. The ill-considered attempt of the King to arrest in person five members of the opposition in the Lower House, could leave no doubt as to the aims of the court. The condition of Scotland and Ireland were such as to lead to the inevitable necessity of voting supplies. The King scarcely attempted to disguise the fact that he wished to devote the money to levying a standing army. Parliament, on the other hand, demanded that it should appoint the lord lieutenant of the county militia; the King refused this, whereupon both parties took up arms. It now proved of great importance that James I. had repealed the older militia statutes as to the gradation of the military service (1 Jac. I. c. 25, sec. 216). The opinion again prevailed that the insular position of the country made an organized army altogether unnecessary. Since this time the Government had reserved to itself the right to recruit soldiers according as need arose. The civil war consequently began with greatly disorganized military institutions. Comparatively destitute of military pretensions as the militia was in the majority of the counties, it completely lost its cohesion so soon as the civil war broke asunder its composing elements. Whilst freeholders and boroughs for the most part took the side of the Parliament, the majority of the nobles and the old landed gentry with their tenants and servants declared for the King, so that at times it almost seemed as if the feudal array of the Middle Ages, and the more modern county militia were drawn up against one another.

tious observance of capitulations and truces, only with less discipline by the Royalists than by their opponents. No trace of class animosity is manifested; even among the conditions of peace of 1546 was included the elevation of Cromwell and six others to the peerage or to a higher rank in the peerage.**

The Parliament took the one course possible under the circumstances. As it had to impose taxes, pay armies, and administer justice, the creation of a kind of executive power had become necessary for the discharge of these functions; though the royal power was still recognized in principle. For self-preservation, the temporary retention of these institutions was proposed to the King in the nineteen articles as a condition of peace, yet not as a precedent of the constitution, but only to save themselves from being delivered over to the vengeance of Charles and his party. Even in the covenant with the Scotch insurgents, which went further, there is contained a solemn engagement upon oath "to uphold the person of the King and his authority."

The party which had been hitherto the leading one in Parliament was, for that very reason, incapable of bringing the

** An external separation into two camps took place also in Parliament itself, when the King in December, 1642, summoned his "faithful" members to Oxford to continue the sittings. Only 118 commoners obeyed the King's summons. The majority that remained away, consisted for the most part of the middle party, members of the Presbyterian way of thinking, and a small number of Independents. The greater number of the lords was likewise at first with the Parliament at Westminster, and it was only subsequently that the majority of the lords went over to the Parliament at Oxford (Rushworth, v. 559 *seq.*). But the great majority even of royalist lords and gentlemen still hold firmly to the rights and privileges of Parliament, whilst the King treats his Oxford Parliament ("The Mongrel Parliament") almost with contempt. On a general average the parliamentary party, as compared with the royal party, was in a strength of about two-thirds to one-third of the population. Nobles and gentry, town and country are to be found in the ranks of both, though in different proportions; only the State Church with its official organization that had now become absolute is wholly and entirely upon the royal side. To the latter belong just those northern provinces in which gentry and yeomanry had still retained their martial customs and inclinations. This circumstance and the unity in the command of the troops created an advantage for the royal party, which, however, became weakened by the fact that the mounted landowners and their tenants could not easily be kept in subordination, and it was even less easy to turn them into a regular army. The parliamentary party had the advantage in numbers, in its greater financial resources, in its better management, and above all in persevering zeal and the religious enthusiasm of the sects for the cause of liberty.

PUBLIC

conflict to a conclusion. True to their principles, they could not overthrow the monarchy, which they recognized as a precedent factor of the constitution, without undermining their own rights. Their principle of an equitable agreement—true and effectual within a recognized constitution—suffered shipwreck, on the impossibility of a compromise as to the broken constitution. And this impossibility lay in the person of the King himself.

Charles had been brought up at a time and with surroundings, in which deceit was regarded as diplomacy. A constitution was altogether incompatible with his notions of the royal power, of royal duties and oaths. The tribunals, and all the oaths taken by officers of the realm had, after an experience of twenty years, proved unreliable. No one could doubt that the King, if he once regained possession of his despotic powers, would return with redoubled energy to his system. His well-known temperament, the feeling of injured honour, and the influence of a proud, intriguing consort, made his return to the constitution incredible. In all the contradictory acts of his public life, falseness and perfidy formed the predominating features. But the fundamental cause of this situation lay in the *system of the divine right* of kings, the faith in which prevailed at court, in the ecclesiastical as well as in the official world. In the atmosphere of this theological jurisprudence it was well established "that between a king and his subjects there can exist nothing of the nature of a mutual compact; that he, even if he wishes it, can permit no interference with absolute authority; that in every promise and oath of the King there is contained the reservation, *salvo jure regis;* that he, therefore, in case of necessity, may break his promise, and that he alone has to decide as to the existence of such necessity." By the immediate derivation of the illimitable royal power from a divine will, the right to it is declared to be incomprehensible to human reason without the grace of revelation. And it is consequently the Church, under its supreme bishop, which finally decides what in the State is sacred as a constitutional

right, and what does not harmonize with the will of God. The Church has the key which fetters and looses not merely the individual conscience, but monarch and people in their constitutional relations to each other. This was the system which the clergy of the State Church pursued through the medium of the King, and the King through the instrumentality of the clergy. Within this system there existed no faith in royal words and oaths, and, as Charles, in contrast to his father, possessed both the courage and the unconquerable obstinacy to identify these theories with his own person, there was no basis upon which a compromise with this monarch could be effected.***

The opposition, true to the constitution, found itself thus in the dilemma of either being obliged to sacrifice the constitution, and with it their persons and property, or of disowning their principles by attacking the monarchy itself. As they desired to do neither of these things, the leading men appeared paralyzed in their action, and each succeeding year less resolute to face the real state of affairs. It was manifest that the party of the Covenant, which had solemnly vowed "to uphold the person of the King and his authority," could

*** The transactions of both parties, especially the nineteen articles, correspond indeed externally with the earlier events of the struggle between Parliament and monarchy, but they are closely interwoven with religious controversies. The covenant which was concluded with the Scotch is pre-eminent in this new region. What rendered compromise impossible was the personal character of Charles which had been experienced for the past twenty years. From the first moment of his reign his words had been promises, and his deeds perfidy; and that not from precipitation, but systematically, and from calculation. A reliable proof of this is the testimony of Lord Clarendon as to how it was understood at court that everything which might be exacted from His Majesty under stress of circumstances, might be retracted by him on the first opportunity (Clarendon, ii. 252 *seq.*). "The next visit of His Majesty to his faithful Commons would have been more serious than that with which he last honoured them; more serious than that which their own General paid them some years after" (Macaulay, "Essay on Hallam," 1828). Until the close of Charles the First's reign the parties in Parliament found themselves obliged to obey the law of self-preservation. With a bitterness, which the contemporaries certainly did not feel less acutely, Macaulay says: "Such princes may still be seen, the scandals of the southern thrones of Europe; princes false alike to the accomplices who have served them and to the opponents who have spared them; princes who, in the hour of danger, concede everything, swear everything, hold out their cheeks to every smiter, give up to punishment every instrument of their tyranny, and await with meek and smiling implacability the blessed day of perjury and revenge" (Macaulay, *idem.*).

not carry to an end the decisive struggle against the King. The fiction was accordingly resorted to, that "the King in Parliament waged war against the King in the Royalist camp." By means of this legal fiction it was possible to carry out a parliamentary programme, but not a war of life or death against actual Cavaliers.

It was only after an undecided civil war had been waged for years, that elements arose from the parliamentary party, whose ideal of Church and State went far beyond the existing order of things. The time of men with a religious faith in freedom had now arrived; and Oliver Cromwell was the first to form a regiment of such "men, well equipped in the quiet of their consciences, and externally in good iron armour, standing firm as one man." It was the sects who had, by the long administrative oppression, and by the Catholicizing tendency of the State Church, been driven to fanaticism. The ultimate results of the absolutist system, compelled from within, had led to an extreme application of the principle of self-determination in both Church and State, which, denying the Church as a common bond of outward life, dissolved it into separate groups according to the views of voluntaryism, and thus dissolved the fundamental conditions of a parliamentary constitution in this direction into a system of Puritanical individualism. Half willingly and half reluctantly the middle parties abandon the field. With a regular army "of the new model" (cuirassiers, dragoons, and light infantry) under able leaders, the contest now ends with the defeat, flight, and capture of the King. As in days of yore in the wars against France, the army of freeholders formed according to the newer military pattern was victorious over all the bravery of the nobles and their followers, which was only effectual in cavalry skirmishes.†

† In the course of the war the Parliament changed from the militia system to the organization of a paid standing army, in which Scotland had already preceded it. In the decisive battle of Naseby there fought on the Parliamentary side regular regiments, certainly composed only of recruits, who had been, for the most part, only for two months with the colours, and with a corps of officers only nine of whom had served in the wars on the Continent.

Hand in hand with the military victory the vindication of the Bible arguments with which the sects attack the divine right of the King is put forward in the Parliament, army, and petitions of all kinds—with a penetration, a dialectic strength, and a stubbornness equal to that of the court theology. In this biblical dialectic the ideal of the republic now appears, of which there was no symptom in the first years of the struggle. The Puritans had till then been religious parties. They demanded free regulation of their affairs in their Christian communities; their ideals were ideals of ecclesiastical constitution. They had desired to fight the King in his character of pope, and not as a temporal monarch. It was only in the breach of the constitution that the now existing inseparability between the ecclesiastical State and State Church became apparent, and with it almost involuntarily the republic as an aim and end. The heretical dogma, that "the sovereign right is based upon grace," and that accordingly the civil authorities lose their right by sinning, becomes secularized in the notion of a "high treason committed by the King against the people" (parliamentary resolution of 1st Jan., 1649). William Allen, adjutant-general of the army, testifies that, at the commencement of the year 1648, the council of officers, "after much consultation and prayer, had come to a very clear and joint resolution that it was their duty to call Charles Stuart, that man of blood, to account for the blood he had shed, and mischief he had done to his utmost against the Lord's cause and people in these poor nations" (Somers Tracts, vi. 499). Whilst the moderate members of the victorious party, doubting in their minds, considered the proceedings that were being taken against the captive King, and negotiated for peace, Charles, incorrigible in every situation, even in captivity, tried the arts of kingcraft to disunite the Parliament and the Scotch, the army and the

whilst the royal army counted more than a thousand of such officers. Yet in spite of this the struggle became one of annihilation in consequence of the discipline and enthusiasm of the Puritan troops. In discipline the "rebels" were from the first superior to the "malignants."

people. Simultaneously there came to light, with undeniable proofs, a new catalogue of his widely spread perfidies. Consequently, without any serious resistance, the moderate parties at last abandoned the King to the remonstrances of the army, and to the Puritan saints. But, in spite of all passion and violence, the loyalty with which individuals and parties cleave to their convictions of right, is characteristic of this contest of principles. As late as the 28th of April, 1648, the Commons pass the resolution "that they are not minded to alter the fundamental government of the kingdom by King, Lords, and Commons." In December, 1648, a majority of the Lower House vote that the King's person is inviolable. And even on the 2nd of January, 1649, the House of Lords (*i.e.* the remainder of the extreme left) unanimously reject the motion to put the King on his trial. ††

But in the meanwhile the remonstrance of the army had been heard in the House, in which "his excellency the Lord General and the general council of officers represent the dangers of the proposed compact with the King, and demand that the person of the King shall be prosecuted in the ordi-

†† The theological side of the party struggle, which seems strange according to our views, harmonized with the events in which the royal supremacy had become the instrument of the overthrow of the parliamentary constitution. The theologians of this period had become statesmen, and the statesmen theologians. No other dialectical weapons except Bible arguments were brought into the sphere of politics in those days. The views as to the relation of the people to the royal papacy of the day stood upon this common ground, which was recognized by all combatants, and which afforded to all parties the arguments they sought. What brought the extreme parties to power was their resolute will to conclude no compromise, because they saw in the King's power altogether an usurped supreme episcopate, which was at variance with the divine will. This view did not perceive that the monarchy was at once the temporal foundation of all class rights, and the indispensable precedent condition of the existing social order. For the sects whose consciences had been sorely offended there was no *via media* between a godless Cæsarism and papistry and the overthrow of the monarchy itself. As the individual in a struggle for liberty forgets both wife and property, so does a people in such a struggle forget that it is a society in which after the victory has been won, struggles, whose end cannot be foretold, must begin afresh. The King, on the other hand, even in the face of such opponents, continues to practise his kingcraft whilst he is a prisoner to the army. "I am not without hope," he writes to Digby, "that I shall be enabled to bring either the Presbyterians or the Independents over to my side, that one party may wear the other out, and I be really once more King." But Charles's "juristisch-priesterliche" Nature (Ranke, ii. 565) had now met its match.

nary course of justice." When, however, the Commons, on the 5th of December, 1648, with 129 votes to 83, resolve that the conditions of peace be accepted, the army intervenes with force of arms against the majority, takes 47 members of the House prisoners, and declares 96 others secluded. After this violent expulsion of the dissenting members by the army, at the last division, in December, 1648, there were only 51 present. In the room of the expelled members, the former minority of Independents, Levellers, and Republicans enter, both in the council and in the field. In spite of the protests that were raised, the remaining minority proceeds to sit as a House of Commons, and brings forward the indictment against the King, for high treason against the people of England.†††

The indictment, the nomination of a judicial commission, the condemnation and execution of the King, is the gravest act of violence in the whole of English constitutional history—an act which can only occur once in the history of a European nation. The fundamental violation of all the legal bases of the State, a violation which proceeded from the person of the King, finally recoiled upon his head. His *jure divino* monarchy, which sacrificed every right of his people to a presumed higher divine right of the King and to the interpretation of the court theologians, is overpowered by a religious conviction, which was surely more real than his own. We can apply to this act no criterion of right and wrong within any existing political system, but only the measure of moral right and wrong in the case of a society which had been brought back into the condition of self-preservation; in the words of Lord Chatham: "There was ambition, there

††† The army extorted the indictment which John Cooke, "in the name of the people of England," brought forward "against Charles Stuart as a tyrant and traitor, a murderer and a public implacable foe of the Commonwealth of England." The difficulty was to find a procedure and a president for such a judicial commission. The King conducted with dignity his defence before the illegal tribunal. His last words were: "Sirs, it is for the liberties of the people that I am come here; if I would have assented to an arbitrary sway, to have all things changed according to the power of the sword, I needed not to have come hither, and therefore I tell you, and I pray God it be not laid to your charge, that I am a martyr to the people." With firmness he met his condemnation and execution, which took place opposite the palace of Whitehall, amid marks of popular sympathy.

was sedition, there was violence; but no man shall persuade me that it was not the cause of liberty on the one side, and of tyranny on the other."

The highest ideals of the human struggles in the Middle Ages,—the hereditary monarchy and the Christian Church,—had guided the English people in its history of a thousand years' duration, and had exalted it to a high degree of morality, justice, and culture. One of these institutions working upon the external side, that of justice, and the other upon the internal, that of the mind and conscience, had acted and reacted upon the other, and transformed and elevated society. Both were, and continued in the process of their realization by erring mortals, to be at all times exposed to abuse and degeneration, which even amount to a caricaturing of the most sacred things. The monarchy under John was certainly more deeply debased than under Charles. The Roman Church was, at the time when Luther rose against it, more deeply degraded than the Anglican Church under Charles and Archbishop Laud. But in John's day, there still stood beside the debased monarchy a Church in the fulness of its moral power, represented by Archbishop Langton and his brothers in office. On the contrary, in the period of the Reformation the degenerate Roman Church was confronted by the heroic forms of the Church reformers and by able monarchs. In the Cæsarism and papistry of Charles I., both sides seemed to be equally degraded and perverted from their proper ends. It is for this reason that the opposition rises to that pitch, when the last resource of society returns which has been reserved from the birth of the hereditary monarchy. Once again society returned to the primitive state of self-protection, in order, by the overthrow of this monarchy, to prove the nullity of a monarchic papacy in a form such as this. Upon the foundation of the declared sovereignty of society (sovereignty of the people) a new political and ecclesiastical edifice had again to be built up, amidst severe struggles and perils both for State and society (Chap. XXXIX.), which were rightly foreseen by the moderate parties in the realm.

CHAPTER XXXIX.

The Republic.

The now kingless State became a Republic, "the Commonwealth of England," as it was called, to avoid a foreign and unpopular expression. An act of Parliament of the 19th of May, 1649, declares the people of England to be "a Commonwealth and free State." The monarchy and the House of Lords are expressly abolished by resolution of Parliament as being "unnecessary and dangerous to the liberty of the people."

The enduring energy of the party which gained this success embodied itself on the one side in a victorious army and its brave lieutenant-general, Cromwell, and on the other in a Parliament, which, after the expulsion of the moderate members, only contained within it the former extreme left. By election of the House there proceeded a *Council of State*, in which Cromwell practically undertook the duties of president. The several measures of government were at first issued partly by the council of State, partly by Parliament, partly by the council of officers, and partly by the Lord-General in person. It was soon manifest that the opinions of the Parliament and of the army on this point, were widely divergent from one another. But the perils by which the country was beset, the necessity of unity in the operations against foreign countries and against the opposing parties of Royalists and Episcopalians, as well as the mediating influence of the Lord-General, held this irregular government together for several years. Crom-

well recognized in the Long Parliament the sole legal bond of union between the past and the present. It was not until the 20th of April, 1653, that he made up his mind to dissolve by force of arms the assembly that had made itself odious alike by its measures and by the permanence of its session. The precise character of the Government remains from that time forward, in spite of certain transient forms, the *military dictatorship of Cromwell*, the incarnation of Puritanism.

And the impartial observer must confess with Macaulay that Cromwell represented the State with honour. Whilst the Stuarts had made England powerless in foreign parts, Cromwell took his place among the most illustrious rulers of the times. The Netherlands, France, and Spain bowed their heads before England's might. The crowned heads of Europe, one after another, did homage to the Protector. Army and navy, Ireland and Scotland, obeyed as they had never done before. Trade and industry flourished, and the commercial policy of the Protector formed the established rule for England for generations; the taxation system was regulated, and a postal system instituted. The Protector was the first to estimate aright England's maritime vocation. Civil justice was honestly dispensed; Westminster Hall, Lord Clarendon himself confesses, had never been filled with more learned or more honest judges than by Cromwell, and never was justice more fairly dispensed in civil cases, in the courts of Law and Equity. Persons of capacity and integrity were chosen for the various departments of the executive, and genius and science were patronized. To this was added a new maxim of government, for which England has to thank the Puritans, the principle of religious toleration. A religious party, which was guided, not by the class interests of the clergy, but by the living realities of faith, could renounce the application of coercive measures in matters of faith. The time had arrived for toleration, now that Protestantism had irrevocably won its position in Europe. Abolition of the penal laws against Catholics could certainly not yet be won from the national mistrust; but they obtain a like measure of tolerance

as the Protestant sects. Even the Jews, after a banishment of nearly three centuries, were allowed to settle again in England. This, and much more besides, was an efficient exercise of a sovereign's calling, to the shame of a degenerate royal dynasty.

In spite of all this, no content prevailed in the country, not even among the dominant party. Like every victorious party, it learnt that its position was changed by the actual possession of sovereign power. It certainly wielded the power, but it was also in conflict with the conditions of society. The structural composition of English society, as it had appeared since the Middle Ages, consisting of lords, gentry, freeholders, and tenants, of burgesses and artisans, clergy and legal corporations, with deeply rooted influences and traditional views, was in irreconcilable contradiction to the political ideals of the Puritan parties. These latter consisted pre-eminently of a respectable portion of the English middle classes, whose civil position afforded them but little experience for political government, and whose ecclesiastical position had, under long oppression, given them the habit of opposing but not of governing. Great and victorious as they were, in the contest of arms, their political ideas were incapable of permanently fixing the form of the constitution. Rather did it become manifest that the demands made by the "people" separated into very divergent opinions and interests. The multitudinous petitions presented to the Long Parliament give us a picture of a public opinion that was as changeable as it was disunited.

The Royalist and Episcopal factions had hitherto formed a majority in the dominant class, which now, vanquished and under the pressure of a common misfortune, held closer together, and waived internal party-differences, including the Catholic and absolutist questions. The long ill-used, but now victorious party, demanded the punishment of those who had taken part in the illegal measures of Charles I., the now so-called "delinquents." The republic, with its hitherto unprecedented financial needs, decreed, to satisfy them, an

enormous sequestration of estates, demanded considerable fines for compounding, and proceeded against those who had seriously compromised themselves, even to the sale of their property. It was calculated that in the years 1640–1659, between three and four thousand gentlemen compounded by paying sums amounting to £1,305,299 4*s.* 7*d.*; the sequestrated estates of those who would not compound, or who were not allowed to do so, were computed at five times that sum. Of the established clergy about two thousand were deprived of their benefices. Vanquished and weakened, but embittered and still possessing personal influence among their surroundings, these groups were irreconcilably opposed to the Government.

The Presbyterian middle party, the former majority in Parliament, which had been violently ousted out of Parliament by the victorious party, opposed the Government in as hostile a manner as did the old Royalists. They had not intended the overthrow of the monarchy. The oath of fealty taken to the republican government was more odious to them, than to the Cavaliers; their clergy refused to publish the ordinances of Parliament from their pulpits in the customary way. The indefatigable zeal for the carrying out of its scheme of a new ecclesiastical system shown by this party made it even more intolerant in Church questions, and at the same time more indifferent to questions of political liberty and civil rights than formerly. After it had nominally established its ideal system of ecclesiastical reform, the system itself proved impracticable, and isolated the middle party in a state of aimless discontent.

In the more radical parties of the left, which had gained the victory, thanks to Cromwell and his army, a gradual decomposition set in, from the time of their actual influence and participation in political power. In one part, the Puritan ardour became secularized to an abstract republican political ideal, with tolerance or indifference in Church matters. In another part, the religious zeal against image-worship and against the episcopal hierarchy remained paramount. The

secularization of Puritanism was naturally strongly represented in the standing army; political radicalism now formed a certain counterpoise to the religious element. But both, alike intolerant in their separate tendencies, were but poorly fitted for moulding the form of the real constitution and for conducting the real political government in England. The sole sovereignty of each of these parties would have become a despotism over the great majority of the people. And on that very account that organization retained the upper hand, which is perfectly indifferent to and independent of property, viz. the standing army.

A new feature for England in this situation was the ascendancy which the middle classes had obtained. Never yet, in the whole of English history, had a spontaneous movement proceeded from the Lower House alone, and still less from the lower middle classes. This time the monarchy was vanquished not by the followers of the barons, but by the brave convictions of simple people, under officers chosen from among themselves, and by an army, in which indeed a number of lords and gentry served, but only as leading men of similar political and religious convictions. This situation had given the middle classes a greatly elevated and self-respecting position, which an existing Government could just as little disregard as it could the temper of the army. Shortly after Charles the First's execution, and after the proclamation of the republic, petitions of the dominant constituents — the "well affected" as they now call themselves—crowded in great numbers from all sides, to make their representations heard in the State. They demand annual Parliaments, emancipation of the supreme power of the "people" from the influence of the King and the lords, abolition of the Privy Council and Court of High Commission, the self-denying ordinance, shortening of judicial proceedings, abolition of tithes, monopolies, excises and tolls, conversion of all taxes into a direct subsidy, the sale of the estates of the "delinquents," no coercion in religious matters, an annual stipend of £100 for servants of the gospel, and so on. The Little Parliament, subsequently

summoned by Cromwell, proceeded to formulate the following demands: abolition of the Court of Chancery, institution of civil marriage, abolition of Church tithes and patronage—demands which, being at variance with the interests of the dominant classes, brought upon this so-called *Barebone's Parliament* the contempt and hatred of a large portion of the community.

Was it possible, after all, out of these elements to form a parliamentary government according to the laws of the land and in accordance with traditional institutions? That government did not merely consist of one parliamentary body formed by elections in certain districts, and the other permanent body by the appointment of nobles; but it was based upon the deeply rooted interweaving of all magisterial rights with property, and upon the substructure of the *communitates*, who governed themselves according to the laws of the land. These social bases of the State had been consolidated for generations past. The higher personal duties in the State were so intertwined with the great landed interests, and the duty of serving on juries and the parochial offices had so grown up with the middle classes, that an English government could only be conducted with the traditional Parliament, constituted by county and municipal unions, partly elective and partly formed by hereditary rights and by office. After the civil war had broken up the old forms, the impossibility of arriving at an harmonious self-regulation in public life through any other combination became manifest. Parish, county, and Parliament confronted each other as *disjecta membra*, from the moment when the established Church and the bishops were abolished, the hereditary peerage set aside, the loyally minded gentry robbed of their political rights and of their possessions, the small enfranchised boroughs abolished, and the electoral qualification altered. The destruction of these foundations made the reconstruction of a constitutional self-government from below an impossibility.

The militia system of the county became impossible in the face of a standing army, whose merits, glory and efficiency

appeared coupled (as is ever the case) with contempt of a militia which in the civil war had proved incapable. The militia of the republic remained accordingly quite a subordinate institution, to which all the less attention was paid, since together with an active militia the local influence of the gentry which was inimical to the republic would also again revive. (1)

In the *judicial system* the continuance of judge and jury in civil cases was practicable; but, in criminal cases, the grand jury, formed of the gentry, and the petty jury, which was disunited by irreconcilable party contrasts, became serious elements of contradiction. A republican government could scarcely expect of such juries that they should enforce the new ordinances by their verdicts. (2)

The strength of the *police system* lay in the office of sheriff and magistrate. A republican government had herein only

(1) The military organization, from the year 1645, passed into the system of a standing army. The organization of this army is exemplary; in discipline and invincible bravery this English army was certainly never excelled by any in former or any in later times. In like manner the Protector was fully alive to the vocation of England as a maritime power, and fostered it by adequate measures. But from 1647 the standing army would not tolerate any attempt to disband or reduce it, and broke out into open resistance of such a measure. The decayed militia institutions could certainly not regain their strength in the face of such a disciplined army, but were only employed for the purposes of police administration and for raising the taxes.

(2) The judicial system met with a difficulty in the existing staff of lawyers, which was so eminently royalist that Parliament in October, 1649, resolved to dismiss from their office and functions all judges, serjeants-at-law, barristers, attornies, and clerks of the courts, who had shown themselves hostile to Parliament and had aided their opponents. The new appointments that were made to the judicial bench by the Protector were so respectable, that even the restoration partly retained these justices, or at all events restored them to their honourable position of serjeants. Of fifteen judges, who were in office at the restoration, not less than nine were found worthy by the new government to be confirmed or recognized in analogous positions (Foss, vii. 3); among them one of the most upright names belonging to the English judicial bench, Sir Matthew Hale. The principle that all the judicial officials proceed from appointment and not from election, was also retained by the republic; and likewise the formality which required that on each change of government the commission should be renewed, which was accordingly done eight distinct times during this period. The civil jurisdiction was so far better than it had been under the Stuarts. In like manner the introduction of the English language into the proceedings in an action was also a welcome reform (Foss, vi. 412). But all this praise ceases, whenever justice comes into collision with the sovereign powers of the Protector. Then judges are dismissed "for not observing his pleasure," judicial commissions are appointed, complaining attornies arrested, and so on.

the alternative, either of appointing fit and proper persons on commissions of the peace in the customary manner, in which case it had to reckon with certainty upon a hostile majority; or it was obliged to appoint fresh unskilled and unfit persons, who lacked the necessary authority. The police administration was, therefore, from the first a weak point. It might work tolerably smoothly in the towns which were more inclined to the republic in their special civic constitution, but in the counties the Protector was unable to remove the old elements entirely, and still less was he able entirely to alter their ancient spirit. It was the military sense of discipline in the republican rule that accordingly led to the introduction of a harsh police system in the place of a self-government according to law. (3)

The *financial system* of the republic required unprecedented resources for the maintenance of a great paid army, which was rendered necessary by the state of affairs in Ireland and Scotland. The old system of taxation, with its self-assessment in the separate communities, was thus insufficient; besides, the parochial constitution had been thoroughly disunited by the political and religious parties. Parliament resolved, according to former precedents, in the course of the year 1649, to make a monthly assessment of £90,000 on the counties and to levy an excise duty of five per cent. upon a long list of articles of consumption. The rating was on the whole justifiable, but fixed very high, and the imposition of taxes so irregular from a legal point of view that force had to be applied to the judicial and police institutions to maintain them. The new taxes weighed heavier upon the bulk of the population than the ship-money and the ordinances of Charles I., and their legality was quite as disputable as that of ship-money. There remained accordingly no alternative,

(3) The police power could not exist under the republican *régime* together with the fundamental institution of justices of the peace. In the counties, at all events, Cromwell could not possibly manage with a magisterial gentry of the old style. The republic reverts, therefore, to the system of provincial governments, which, however, owing to their puritanical zeal came into conflict with popular customs.

but here also to put the new military and police power in the place of self-government. (4)

In the province of *Church government* the place of the overthrown established Church was taken by the equally intolerant ideas and constitutional schemes of the Presbyterians, in spite of the constant opposition of the old parties and the smaller sects. Every benefice was, henceforth, to have its parson and several lay-elders; several benefices taken together form a district synod, with a presbytery of clergy and elders; several synods form a province with a provincial assembly; at the head of the whole an ecclesiastical national assembly. But this system of piling up electoral assemblies proved as dangerous as it was impracticable for the teaching vocation of the Church and for its relation to the State. The spiritual electoral bodies at once showed the same bigoted intolerance as was manifested by the episcopal system, and were soon at variance with the Parliament, which was not inclined to recognize the "divine right of the presbytery," but on the contrary retained the appeal from spiritual courts to temporal tribunals. Such a variety of tendencies and institutions were interwoven in the ecclesiastical world, that the principle of tolerance, which the Protector followed from conviction, was almost a natural result. The confusion in this sphere had become so complete, that external toleration naturally resulted as a necessity for a cautious Government. (5)

(4) The financial system of the republic made quite unprecedented demands. Sinclair ("Revenue," i. 285) computes, but probably in an exaggerated way, the revenue returns of the State from November 3rd, 1640, to November 5th, 1659, at £83,331,198, of which £32,172,321 was land tax generally in monthly assessment; £7,600,000 tonnage and poundage; £8,000,000 excise; £3,528,632 from sequestrations; £10,035,663 from the sale of ecclesiastical estates; £4,564,986 from sequestration and composition with royalist gentlemen; £2,245,000 by the sale of the lands of delinquents. The requirements of the standing army appeared to swallow up all. At the opening of Parliament (13 Charles II.) Lord Chancellor Clarendon was able to say: "That monster Commonwealth cost this nation more in her few years, than the Monarchy in six hundred years."

(5) Most difficult of all was the state of ecclesiastical affairs. After the suppression of the Episcopal Church the Presbyterians succeeded in realizing their long-cherished ideal. About two thousand clergy of the State Church were obliged to yield to the new order, the majority of whom, however, are said to have been removed on account of evil life or ignorance, for whose support one-fifth of their emoluments was reserved. The vacant benefices were filled by men, who were recommended

All these conditions and circumstances pointed to the concentration of the political power in one person, and in Oliver Cromwell the person destined by Providence was found. The stolidity of this man, coupled with an indefatigable activity, personal courage, and energy, the dry, blunt manner with which he makes straight for his object, are incarnations of the English character. To it belongs especially his honesty and the sincerity of his convictions, often misinterpreted by later writers on account of the biblical unction of his words, which was the language of the time and of the party to which he belonged.* Only an entire misconception of the real state of affairs would ascribe the impossibility of the protectorate's arriving at an understanding with a Parliament, to ambition or thirst for power on the part of the Protector; for it was really due to the internal decomposition of all those cohesive elements by which the parliamentary constitution was organically welded together. It was, in fact, impossible to retain the old English counties in the old form of county courts, as electoral bodies of Parliament, and still more impracticable was this in the deeply disorganized Scotch and Irish counties, which the Republic had incorporated into its constitution. From this condition of things no English Lower House, no

by the parishes, and confirmed by the ecclesiastical synods. The influence of this tendency was sufficiently strong in Parliament to bring about by ordinance the institution of presbyteries, but which only in London, Lancashire, and in one or two counties was actually carried into effect. The intolerant presumptuous spirit of the Presbyterian confession, had developed itself to such an extent that by this very means the way was smoothed for the restoration of the Episcopal Church.

* English history of a later time, after the constitutional struggle had been ended, has been written in an inimical spirit towards the conduct of the Protector. It has been exceedingly difficult for the English, down to the present century, to be just towards this man and his party. Modern "hero-worship" has attempted to set this right. Guizot's verdict is unjust, and coloured by personal as well as by national prejudices. Against it may here be placed the judgment of a doctor of divinity of our day: "The age was an age of faith—we may say, of a child-like and a loving faith. Such men as Elliot and Hampden, Cromwell and Vane, believed in God and Christ, in sin and the evil one, in heaven and hell, as the Bible presents them, and very much as Milton has depicted them. The world to them was full of spiritual influences, both good and bad —full eminently of God. Where duty called, men of this order could brave all things, and still feel that nothing was hazarded. To them there was no such thing as accident. All was in the highest hands" (Vaughan, iii. 132). Ranke's opinion is very objective (iii. 435–584).

English Upper House, no harmonious executive power for the legislation and taxation of the country could arise. The parliamentary constitution had grown out of a system, in which political rights (as being the exercise of the royal rights) had emanated from the unity of the royal power. After the overthrow of the monarchy, the dismembered limbs lacked the legal basis necessary for uniting the antagonistic social interests and the still more incompatible ideals of the political and ecclesiastical systems upon a common ground recognized by all the different parts. Each party threw upon the other the blame for this state of affairs. According to a plan that was correct *in thesi*, one part of the upper classes was desirous that Cromwell should assume the regal crown. Nobles and gentry both thought that with the monarchy their higher privileges would revive, and the clergy considered that it would be the means of restoring the Established Church. The lawyers thought also that the laws touching the impunity of those who serve a *de facto* King might prove useful in the event of a restoration. "A king of England," says Thurloe, "can only succeed to a limited prerogative, and must govern according to the known laws. A protector, although with less nominal authority, has all that the sword can give him." The republican strictness of the council of officers, however, induced Cromwell not to assume the royal title. He himself also probably felt that the regal dignity would alienate and isolate him from his own party, and that an historical monarchy could not be replaced within a living generation by a new dynasty from among the people. He preferred the title of Protector; retaining at the same time certain important attributes of sovereignty appertaining to the old constitution. His consent to the most important acts was necessary, and occasionally the clause even occurs, "and this shall not be changed without the consent of the three estates in Parliament." Cromwell was content to obtain the powers necessary for the present conduct of political business. He also satisfied the obligations into which he had entered by making from time to time an attempt to summon a Lower House according

to the traditional forms, and to obtain the authorization to form an Upper House, though it was difficult to wring from the existing electoral bodies the consent to the appointment of an Upper House. His creation of lords, though performed with caution and conscientiousness, only aroused universal opposition. An Upper House, as the permanent depository of a permanent legal system, was really desired by no one, because nobody wished the state of affairs then existing to remain permanent. On that very account it was impossible for the Protector to obtain an harmonious co-operation with any parliamentary body. Disgusted with parliamentary debates and majorities, which could arrive at no positive system of government and at no positive opposition, he dismissed his Parliaments with words of reproach. Apparently he had himself failed to discern the internal reasons why Parliament could neither by severity nor by indulgence be brought to co-operate with the executive Government.**

But the Protector was not in the dark as to the needs of the State and as to the course the Government must necessarily pursue. The traditional offices were retained as far as was feasible, and filled with proper persons. The central Government was, in all essential particulars, conducted on the earlier lines of the King in council. In the administrative committees, the necessary consideration paid to the men of his own party was so far modified by the energetic control of the head of the Government, as a new executive is capable of doing. All that a royal Government, acting from the centre of the realm could perform, both internally and externally, was performed by Cromwell in quite a different manner from the Stuarts. But what this Government, from the nature of its creation, was as yet unequal to, was the exercise of sovereign rights through the constitutional organs of the *communitates*, and through the traditional self-government, to which it was hardly less opposed than Charles I. The taxes imposed

** These attempts are so experimental in their nature and so transient that six or seven Parliaments of the republic are mentioned; I have reviewed them all together at the close of this chapter.

by ordinance were refused, and, to quell this opposition, there were no criminal verdicts to be obtained from the jury. Accordingly a new "high court of justice" was constituted, analogous to the Star Chamber. Some persons were even condemned to death for violent resistance. For the same reason the provincial governments were again revived. The realm was divided into districts, under eleven major-generals, for the most part bitter foes of the Royalists, and harsh and overbearing towards the civil authorities. The military governor is responsible for the submission of his district, has authority to levy troops, to exact taxes, to disarm Cavaliers and Catholics, to examine into the conduct of the clergy and schoolmasters, and to arrest dangerous and suspicious persons. The State had to be governed; but the longer this Government continued in opposition to the social bases the more oppressive did it appear. The complaints against it are, at the close of the protectorate, constantly increasing.

Thus the state of affairs became, on the whole, more and more like the absolutism under Charles I., and from year to year the feelings of the upper classes turned as one man away from this rule. The old lords who had been removed from the Upper House were living partly in exile and partly in sullen retirement on their estates. The old gentry were in a similar position, partly persecuted, and robbed of their lands as "delinquents," with their old influence both in county and Parliament broken down. The established clergy had been in great measure dispossessed of their benefices, though partly submitting with reluctance to the Presbyterian constitution. The powerful law corporations were no longer summoned to the high offices of State, and were offended by reforms in the judicial system. Families, which had hitherto enjoyed distinction, were driven from their influential position, with all its pleasures and advantages. In their stead new men were almost universally at the head of the regiments and in possession of the offices; education, eloquence, and parliamentary ability were eclipsed by military merits and skill of a different kind; in principle only the "well-affected"

everywhere preferred. It is thus readily conceivable how the achievements of the fanatical Puritan party were followed by an implacable hatred on the part of the wealthy classes. The forcible removal of all long-established institutions left behind, even in those who recognized in principle the justification of the revolution, a feeling of a wrong committed in carrying it out. It is for this reason that the period of the republic passed away without leaving any trace, either upon the inner life of the State or that of local government. Not a single institution, not a parochial office, not a single administrative rule of self-government dates from that time. Even the church rate had to be maintained by coercive ordinances. Such a system could only be kept up by the means by which it had arisen—by the standing army. Instead of the King and his courtiers the Protector rules with his officers, and self-preservation compels the party to remain in this position. It is the necessary consequence of every violent constitutional change that it is not the "people and the true right," but only a single party with its social and party interests that succeeds to the executive power.

And why had all this come about? England had wished to ward off absolutism; it had risen in arms against a violent and perfidious king, to defend the liberty of its Protestant faith, to defend the traditional law of the land in Parliament and in county, and to defend the liberty of the subject and of property. Instead of achieving this, the country found itself terrorized by a still more rigorous ruler, by a standing army, by a military-police system of rule, and by a disregard of Parliament and of all the free institutions of the land. What no party desired to be permanent could only be an *interim*. The death of the Protector could not but lead to a return of the old party-majorities, and these latter to a restoration.

NOTE TO CHAPTER XXXIX.—The following is a list of the attempts made by the republic to form a constitution:—

1. *The first constitution* is the Sovereign Republic under the Long Parliament, with an elected Council of State. The Commons had already, on the 4th of January, 1649, declared that they, as the chosen representatives of the people, wield the supreme power of

the nation, and that all laws enacted by them, even without the co-operation of the King or House of Peers, are binding on the people. The style of all decrees was to run "*auctoritate Parliamenti Angliæ.*" The House of Peers was abolished as being "useless and dangerous;" in like manner the monarchy as being "unnecessary, burdensome, and dangerous for the freedom, safety, and public interest of the people." On the 15th of February a preliminary Council of State was appointed, which from time to time "receives the orders of the House." For the years 1650, 1651, 1652, 1653, a Governing Council of forty members was appointed, consisting tolerably regularly of the same persons. But this council is continually opposed by the Great Council of Officers, which even in the course of the year 1648, plays such a violent part. The army had formed for itself a kind of constitution: the staff officers constitute the upper council, each company or squadron chooses two adjutants or "agitators," who form a lower house. As the regiments are without chaplains, the officers and soldiers took upon themselves the duties of praying and preaching. The highest tribunal is a council of nine officers and civilians. The whole, with its reminiscences of the parliamentary system, and of the ecclesiastical organization, forms a compact body, which was only preserved by Cromwell's influence from the constant danger of a rupture with the Rump Parliament. On the 19th of May, 1649, England was by Act of the Parliament declared to be a "Commonwealth and a free State." Every member of the House was required to promise allegiance to the "Commonwealth of England, as now constituted, without either a King or a House of Lords." On the 9th of January, 1650, by a resolution the number of future deputies for the counties and towns was resettled, and so distributed that for the future the House should consist of 400 members. In the meanwhile the small number of members of Parliament was to a certain extent supplemented by bye-elections. In February, 1650, their number had reached the total of 108; in November, 1652, it once amounted to 122 members. Although in formal possession of political influence, yet the House could never arrive at a resolution touching its own dissolution. The initiative though often taken was again and again postponed. Owing to its long duration, to the small number of members, and to the suppression of the House of Lords, the assembly lost more and more its representative character. It was, in fact, nothing more than a committee of confidential men of republican and strictly Puritan proclivities, which all along only represented the minority in the country, and was only able to assert its position by leaning on the army for support. In the army republican ideas were more violently and strongly represented than in the House; in the Council of State the reverse was the case. Of the forty members of the first appointed council, only nineteen could be prevailed upon to declare their consent to the proceedings against King Charles. Yet this House was the sole legal bond which knit the present to the past. Among the manifold collisions with this political body, Cromwell waited for the growing discontent which was certain to result from the harsh decrees, the imposition of taxes, the mistakes, and above all from its refusal to pass a resolution touching its own dissolution. On the 20th of April, 1653, the day had arrived on which with harsh words he declared the Parliament dissolved, and caused the chamber to be cleared and closed by soldiers. This is followed by

2. *The purely military dictatorship*, which Cromwell undertakes as captain-general of the army. After a few weeks, however, by summons under letter and seal of the "Lord General," a number of men of confidence were convened, who were nominated by the council of officers (apparently also on the proposals of the clergy). The assembly met on the 4th of July, 1653, and gave itself the title of Parliament, but was called by contemporaries the Little Parliament, or Barebone's Parliament. The greatest number of members amounted apparently to 113. After making various proposals concerning changes in Church and State, and electing a Council of State, the assembly declared on the 12th of December "that the continuance of its sittings would

not conduce to the weal of the Commonwealth," and placed its mandate of summons in the hands of the Lord General. The pious, honest assembly, in which the middle classes were strongly represented, had busied itself with motions for improvements, which particularly concerned its own sphere of life. It demanded the abolition of the Court of Chancery on account of the delays of that tribunal, and on account of the uncertainty of its decisions (the arrears are said to have amounted to twenty-three thousand actions), codification of the laws of the country, the appointment of new presidents for the courts (for which only two barristers were designated); the introduction of civil marriage before the justices of the peace, out of regard to the numerous Dissenters; at the same time the intention was expressed to abolish tithes and church patronage in the future. Further bills affected the regulation of the excise, the abolition of unnecessary offices and reduction of salaries. But these demands, reasonable enough in themselves, brought upon the assembly the scorn and the bitter enmity of the upper classes, especially of the clergy and lawyers. The Protector could carry out only a few of these proposals. In consideration of the resolutions passed by the Long Parliament with regard to the constitution, new writs of summons were issued for a Parliament to meet on the 3rd of September, 1654, and thus came about

3. A constitution with a *Lord Protector holding office for life*, and an *elective Parliament according to the one-chamber-system*. In the writs of summons to this Parliament the majority of the small boroughs were passed over, but on the other hand the number of knights of the shire was considerably increased. At the opening there were about three hundred members assembled. (For information respecting this Parliament, see "A Diary of Thomas Burton, Esq.," by John Towell Rutt, London, 1828.) The Lord Protector in his opening address speaks of the necessity of a settled establishment, which could be expected neither from the Levellers, who wished to reduce everything to equality and to introduce a party government in civil matters; nor yet from the sectaries, who wished to overthrow all order and government in ecclesiastical things. But there was evinced in the first transactions a democratic spirit opposed to the protectorate. In consequence Cromwell declares as early as the 12th of September, 1654, "that he had received his office from God and the people, and that he did not intend to annul the privileges of Parliament; but necessity knew no law. He had therefore caused the doors of the Parliament house to be closed, and demanded of the members before their entrance a written recognition of his authority, without which they would not be allowed to enter." The Parliament yields; but its further proceedings still retain the character of a democratic assembly. According to resolutions passed by it, short Parliaments are to be assembled at fixed periods. The franchise in the counties is to be enjoyed by all freeholders of forty shillings yearly income, or possessors of £200 value in real or personal property; in the boroughs the old customs, charters, and privileges with regard to the elections are to remain in force. The number of members for England and Wales is to be four hundred; for Scotland thirty, and thirty for Ireland. The members are distributed with a view to the equalization of the several constituencies; the petition of the army of June 16th, 1647, had already demanded that the distribution of the deputies among the constituencies should be so arranged according to a certain *rule of equality*, particularly with regard to the amount of taxation, that the poor petty boroughs should be omitted, and the number of knights of the shire increased. Accordingly 270 deputies are for the future to be assigned to the counties, and 130 to the towns. To the House belongs exclusively the legislative power and the right to impose taxes. The Lord Protector grants all titles of honour, but no hereditary titles without the consent of Parliament. The formation of an Upper House or of any permanent body for the protection of the established legal system was never mooted. A Parliament elected in this manner has of its own initiative hardly ever considered any other legislative body to be necessary, save and except itself. The members

of the council of 21 members are to be nominated, indeed, by the Lord Protector, but confirmed by Parliament. The question, as to whether before the definite acceptance of this constitution a conference shall take place, to come to an understanding with the Lord Protector, was rejected by 107 to 95 votes, whereupon, on the 22nd of January, 1655, Cromwell declares the Parliament dissolved.

4. A new constitution with a *permanent Lord Protector* and *two Houses of Parliament* is the outcome of the third Parliament, which Cromwell summoned on the 17th of September, 1656. The Protector demanded that only such members should be admitted "as had been approved of by the council, and received a certificate to that effect." In this way 93 members were excluded; yet after long protest they were at length admitted. According to a constitutional decree of October 1st, 1656, the Lord Protector shall give his consent to every statutory enactment; but in case the consent be not given within twenty days, the enactment shall become law without such consent. In the course of the debates it is manifest that the wealthier classes and the old parliamentary ideas are reviving. An "establishment of the Government upon the old and tried basis" is again mooted. The Protector is allowed to appoint his successor. Parliament is to consist of two Houses, the "other house" of 40 to 70 members, appointed by the Protector, confirmed by "this House." On the 25th of March, 1657, by 123 to 62 votes, the resolution was passed to the effect that "his Highness be pleased to assume the name, style, title and office of King of England, Scotland, and Ireland, and exercise the same according to the laws of these nations." The right of free dissolution of the present Parliament was expressly recognized as belonging to the Protector. The Protector, however, after some consideration, makes known on the 12th of May his definite refusal of the royal title. On the 26th of May the constitution comes into force. On the 24th of June the Lower House resolves that "the other House of Parliament" shall "without further approbation" enter upon the functions which were laid down by the constitution. On the 10th of December, 1657, the Protector makes use of his right of appointment by summoning for life 63 members known as respectable men, but to whom public opinion would not concede the dignity of a House of Lords. As the hereditary peers hesitated to accept the new life dignity, the Protector was obliged to bestow the majority of his appointments upon persons who had risen to a certain position through the recent conditions of property and party. Both Houses assemble together on the 20th of January, 1658, received by the Protector with the address: "My lords, and you the knights, citizens, and burgesses of the Commons." On the first message "from the Lords," however, an opposition is raised to this title; the message is refused. The debate upon the point lasts for several days, until on the 4th of February, Cromwell dissolves the House with the declaration that he had not wished to undertake the Government without a number of persons between him and the House of Commons, for the prevention of tumultuous and popular tendencies. But only conflict has been the result, and no one was satisfied. He dissolved this Parliament, "and let God be judge between you and me." On the 3rd of September of the same year Cromwell died, worn out by the cares of such a Government; he was buried with royal honours. Then followed

5. The *Protectorate of Richard Cromwell*, with both Houses of a new Parliament, January, 1659. The elections to the new Lower House were conducted in the old fashion by summoning again the small boroughs, which had been hitherto excluded, and with a strict return to the old parliamentary notions. The Protector and the existing constitution were indeed recognized, but after lively debates and amidst expressions of general discontent, in which the question was mooted, "What authority abolished the old constitution?" The Long Parliament was described as being a "handful of the House of Commons," and as an oligarchy, "detested by all who love a free commonwealth." The other House was "for the present session" recognized as a House of Parliament, yet with the proviso, that it was not the

intention to exclude such old peers as had proved faithful to the Parliament from their privilege as members of that House. Fiery debates were especially caused by the question of the admission or non-admission of the thirty Irish members. On the 22nd of April, upon the demand of the army, Parliament is dissolved. Richard Cromwell's protectorate was no longer acknowledged. The officers demand that the members of the Long Parliament, which Cromwell had dissolved, be again summoned. Hence follows

6. The *reassembling of the Long Parliament* (*the Rump*), in May, 1659. The old speaker, Lenthall, and about fifty members (who gradually increased to about a hundred) take their seats again, and declare "that they have been again restored by God's grace to the liberty and rights of their seats, wherein they were interrupted on the 20th of April, 1653." They elect a council of state, but arrive at no actual resolutions. In October violent dissensions break out with the army touching the competence of the civil powers. By force of arms the discharged officers prevent the assembling of Parliament. Then follows an intermediate despotism by the army with a *committee of safety*. By settling their arrears of pay, and by the mediation of General Monk, external order was restored, but the Parliament was obliged to agree to receive again the members who had been violently expelled in December, 1648.

7. The sessions of the *Long Parliament in its changed form* continue for several months. On the 16th of March, 1660, however, a bill was read for the third time, dissolving "the Parliament assembled on the 3rd of November, 1640," and convening a new assembly of lords, knights, citizens, and burgesses for the 25th of April, 1660 (the so-called *Convention Parliament*), which resolved that Charles II. be restored to the royal dignity. With regard to the elections of the future Lower House, a resolution was adopted on the 4th of February, 1660, to the effect that "This House shall be filled up to the number of four hundred for England and Wales, and the distribution be as agreed in 1653."

CHAPTER XL.

The Restoration.

As the individual, consciously or unconsciously, primarily judges the rights of his time and his surroundings according to his own interests, so, in a greater degree, does every class of society. Therefore it is that public opinion (the voice of society) is wont to judge of a party not by the rights or wrongs of its origin, but by its present doings, and therefore it is that the fate of parties of action in the life of nations is always the same. They are allowed to pursue their way, to grow, to act, and to wax great, only to be condemned and repudiated. This reaction is more violent in proportion as the victorious party more vehemently attacks the rights of the upper classes of society. For centuries the social rights of the lords, of the old gentry, of the established clergy, and of the legal profession had not been so much injured as under the republic, and that too, as it now seemed, without sufficient reason. The danger of absolutism had been removed by Charles the First's tragic end; the futility of such efforts as his appeared irrevocably established. The general ideas of the time from that day onwards are manifestly turned in the direction of change. The death of Charles I. had already estranged gentler minds from the victorious side. Moderation and justice now seemed to many contemporaries to stand upon the other side. Had not the King in 1640 conceded to everything that was fair? His execution had left behind it

only the recollection of his royal bearing in his last hours, and of the many virtues of his private life. Everything that had happened might well appear as an evil dream to the generation that was growing up under the oppression of Puritan military despotism.*

The true expression of these feelings and of the relations of power is the freely elected Parliament, which resolved the restoration of Charles II., about half of the members of which were Cavaliers, another half Presbyterians with a small fraction of fifty Republicans. On the entry of the youthful King the enthusiasm was so great that Charles in his pleasant manner remarked: "It must certainly have been my fault that I did not come earlier; for I have met no one to-day who has not said, that he always longed for my restoration." The phenomena of a restoration of the upper classes are psychologically always the same. Wherever the interests of society advance into the foreground, it can only happen in the manner of egoism, which is the essence of society. In the storm of addresses of this time, the English universities take the first place in a strange attitude, as representatives of theological jurisprudence. Oxford declared "that it would never depart from those religious principles, by which it was bound to obey the King without any reserve or limitations whatever." In a special act the theory of Filmer as to patriarchal monarchy and the rule of primogeniture (above, p. 238), as the God-appointed form of government was afterwards proclaimed. Charles II. was declared to be

* The long hesitation and vacillation before the advent of the Restoration (Ranke, vol. iv. pp. 1–122) is explained on the one hand by the continuous fear of the armed republicanism of the army, and partly by the apprehensions of an extreme eagerness to "restore." It was well understood that to reinstate the family of an executed King, surrounded by a deeply offended circle of followers thirsting for vengeance, and to restore a suppressed party, whose losses could not be repaired without attacks upon property, was no easy task. The equally contradictory and obstinate pretensions of the Anglican, as well as of the Presbyterian Church parties, were sufficiently known; the unsettled disputes between Crown and Parliament were still in remembrance. These considerations delayed the act of restoration, and for this transitional stage there was found in General Monk a cautious and safe man. It was only after the perfect safety of the profession of royalism was established, that the storm of loyalty burst forth.

the "sweet savour in the nostrils of the Lord." Cambridge also condemned in strong terms "the violence and treason of those vehement men, who maliciously endeavoured to divert the stream of succession from its ancient bed." The zeal of the Restoration against Puritanism became in the sphere of social life, in art, science, and popular drama, and even in the sphere of domestic morals, a caricature. In good society the battle between "wit and Puritanism" became for a long time "a war between wit and morality." But the whole people now seemed to vie in condemning the revolution and its ideas, which, as they could not be sufficiently punished in the body, were accordingly hunted out in the grave, by attempts to dishonour the corpses of Cromwell, Ireton, and Bradshaw. The name "Republic" which had ever sounded strange to the people, was now connected with the memory of a long despotism, with sequestrations, confiscations, ruinous taxes, a military police system, and a sullen Puritanical rigidity of morals. It was only the Presbyterian middle party, which in religious conviction and in serious apprehension of the future, strove to maintain moderation. (1)

In the first stages of the Restoration both parties proceeded side by side in comparative accord with forced moderation, which was necessary, if only from the continued presence of the Puritan army. Their joint work is the restoration of the parliamentary constitution, that is:

Solemn recognition of the hereditary monarchy and the sanction of its inviolability by the punishment of the "regicides,"

(1) The so-called Convention Parliament first met at Westminster on the 25th of April, 1660. On the 1st of June, when the King for the first time appeared in the Upper House, there were already assembled three dukes, two marquises, thirty-six earls, five viscounts, and thirty-three barons. In the Lower House the Presbyterian party was still so strong that on the 12th of May, 1660, Lenthall met with a sharp reproof because he had spoken disparagingly of the proceedings of the Lords and Commons in the last Parliament up to the year 1648, and had placed those who had drawn the sword in defence of their just liberties on a level with those who had struck off the King's head. The negotiations touching the amnesty came, after many adverse intermediate stages, to the final result, that those who had taken part in Charles the First's death were, to a certain extent, decimated. The ten regicides who were executed died, with one exception, with the firm and manly expression of the conviction of their right.

who had taken part in the sentence of death passed on the King.

Restoration of the Upper House, that is, of the hereditary lords, yet afterwards with suspension of the Catholic votes.

Restoration of the Lower House, that is, the representation of the counties and the customary towns, by which the decayed boroughs receive back their franchise, whilst it was taken from greater towns such as Manchester, Leeds, and Halifax.

Restoration of the County Constitution, by suppression of the military governments and by the reorganization of the militia as the army of the wealthy classes. (1ª)

Restoration of the royal supremacy, with which, in its later course the episcopal constitution, the acts of uniformity, the ecclesiastical jurisdiction and the liturgy of the Established Church again revive; and of course the right of the bishops to sit and vote in the Upper House.

To these are added certain statutes in the common interest. An amnesty, with the exception of the regicides; immunity of landed estates from feudal burdens; restoration of sequestrated and sold estates, to the Crown, the Church, and private individuals. But, as a statute could not be agreed on as to this last point, the old possessors took forcible possession by

(1ª) In the *militia legislation* (13 Car. II. c. 6; 13 and 14 Car. II. c. 3; 15 Car. II. c. 4) the militia appears purely as a counter-organization to the republican army and as an armed force of the wealthy classes. The right of appointing the deputy-lieutenants and the officers of militia, exercised by the lord-lieutenant, results in the administrative and military corps being formed of the county gentry. The great landed gentry (£500 income from land) and the richest municipal landowners (£5000 other property) furnish the cavalry. The rich farmer (£50 income from land) and the well-to-do citizen furnish the infantry. The rest of the population is, as regards the duty of furnishing troops, *infra classem*. The constables may, however, compel petty landowners of less than £50 annual income from land, or £600 in personal property, to furnish in the same proportion weapons, pay, and other additional expenses. Papists and others, who refuse the oath, can be forced to pay £11 a year to furnish a horseman and his equipment, or thirty shillings for a foot soldier and his equipment. However, no one need serve in person, but each may furnish a substitute to the captain for his approval. For defraying the expenses of munition and other needs the administration may impose an annual rate, which must not exceed a quarter of the monthly land-tax of £70,000, as raised by 12 Charles II. c. 29. All this was directed against the Puritan army, but under James II. was turned against the King's power.

driving out the new, in which transactions, however, a great part of the injured parties went without compensation. After the settlement of these difficult points, the Puritan army was disbanded in the most orderly manner, without any attempt at resistance. The upper classes were thus restored to their ancient position; and upon the former knights'-fees very valuable immunities were conferred. (1[b])

But the next use which the restored classes make of their newly regained influence is, after the last barrier of moderation (the army) had been removed, to wage a systematic war with the moderate Presbyterian party, which had now done its work; as well as with the cities and boroughs, which had naturally roused the hatred of the knighthood. With calculating sagacity the half-Presbyterian Parliament of the 25th of April, 1660, was dissolved at the close of the year. The new elections bring in a Parliament that was almost entirely royalist. Although the Restoration had been brought about by the co-operation of the moderate middle party, the present majority does not scruple subsequently to denounce the Presbyterians, together with the Puritans, as anarchists, and by a series of Acts of Parliament, systematically to persecute all parties of "resistance" in both Church and State. Compared with the behaviour of the republic towards the "delinquents," the Restoration meant to remain a step behind in the application of force; but, with the systematic consistency

(1[b]) The transaction of the abolition of the military fiefs was in England no contest as to the abolition of privileges, but of burdens. The feudal dues on change of possession, wardship, marriage, and the like, owing to the uncertainty of their periodical enforcement, had for a long time become unsuitable burdens. The republican Government had no longer raised them; their reintroduction could not, even in spite of the passion for "restoring," be dreamt of. And in the like manner it was certain that the Crown must be compensated for this chief source of its royal revenue. But instead of imposing the compensation as a permanent rent or increased land tax upon the majority of landed estates, a malt-tax was resolved upon, which burdened persons of quite a different sort. This resolution, even supposing a state of distress had existed among the impoverished gentry, could hardly be justified, and was passed in the Lower House with only a majority of two. The whole of the landed estates in the country were, by 12 Charles II. c. 24, declared to be held from that time forth in *free and common socage*. But their liability to the land-tax and parochial taxes continued, of course, as heretofore.

of party, the present majority insisted upon expulsion of its opponents from every office of authority in both Church and State, and upon a purification of the bureaucracy. As the majority of the civil local officials were corporation officers, this step could only be made effectual by introducing oaths of office, which excluded every honest opponent from holding office. The "Act for the Regulation of Corporations" makes a confession of the illegality of resistance a condition of being admitted to, and also of continuing in, any civic office. Those elected to serve in the future must, besides, have received the sacrament according to the rites of the Anglican Church within the year before their admission to office. In like manner, by a new Act of Uniformity, the acceptance of the Anglican Prayer-book was made a test for ecclesiastical offices, in order, in spite of solemn assurances, to drive away the Presbyterian clergy from their benefices. When the appointed day arrived, two thousand clergymen resigned their places. Every ordained clergyman must in future take an oath as to the theory of non-resistance, otherwise he is prohibited from teaching in schools, and is even forbidden to reside within a radius of five miles from an incorporated town. Supplementary police laws against the so-called conventicles, that is, against the religious service of Dissenters, and laws for the limitation of the right of petition and for securing a stricter censorship of the press, are the ordinary apparatus of a political reaction, which here proceeds spontaneously from both houses of Parliament.(2)

(2) The second' Parliament, also called the *Long* or *Pensioner-Parliament*, meets on the 8th of May, 1661, and continues, with long adjournments and prorogations, until the 24th of January, 1679; that is, almost eighteen years. At the commencement of this Parliament the Restoration suddenly changed into an immoderate reaction against the former republican and middle parties. But, as is always the case, the war-cries of the watchmen of Sion ring out loudest in Church and State when there is no longer any danger to combat, but when selfishness begins to make profit of the victory that others have gained. The Restoration was justifiable from the point of view of the ruling class, in so far as what it strove for and recovered really belonged to it. The use, which both gentry and Established Church in a passionate party spirit begin to make of their regained power was unjustifiable. Their hate appears to be implacable, and frames one persecuting measure after another. The Corporation Act (13 Car. II. c. 12), for the purification of the civil bureaucracy and for the permanent expulsion of all

The exaggerated party watchwords of the Royalists, the violence of their measures against all opposition, against the press and the rights of societies, may easily cause the appearance of retrocession beyond the boundaries of parliamentary constitution. And thus has the Restoration been, in fact, frequently considered, though very erroneously. In spite of all the indignation against the Revolution, all the ostentation on the part of the universities, and all the patriarchal theories, the fact remained that the Restoration meant the reinstating of the monarchy by the wealthier classes, who on that very account, in both Upper and Lower House, assert a pretentious self-consciousness, such as had not been seen in England since the barons' Parliament. Notwithstanding all theories, no single advantage which had been gained in the Revolution was surrendered by these classes, and not one single real parliamentary right acknowledged in the struggle with Charles I., was again disputed. The watchword "Non-resistance," upon which so much stress was now laid, only expresses the royalist theory in the defensive, very different from the positive claim to "absolute sovereignty," which was advanced in former days. Just as little could the established ecclesiastical hierarchy undo the fact that it had been reinstated by the wealthy classes, and not *vice versa*. The independent hierarchical tendency of the Episcopal Church broke down from that time, and as from the first it found in Charles II. no sincere protector, it was obliged to lean upon Parliament. Both to its advantage and to its prejudice, the Church henceforward was again interwoven with the position of the ruling class. The Revolution, in spite of all the hatred which it had left in its train, had smoothed the way of parliamentary government. The firmness of character displayed

Dissenters from the municipal offices; the Act of Uniformity (13 and 14 Car. II. c. 4), more severe than that under Charles I., for the expulsion of opponents from the ecclesiastical offices and benefices; the press and censorship Acts (13 and 14 Car. II. c. 33; 16 Car. II. c. 7); the Act against conventicles (16 Car. II. c. 4; 22 Car. II. c. 1). But the deeply framed Test Act (25 Car. II. c. 2), which contains the rule that all offices of authority must be held by members of the Established Church, is meant as a counter-move to the court idea of a reconciliation with the papal chair.

by a Hampden, a Pym, and an Elliot, and the unscrupulous determination of the Puritan champions, had left behind them the universal feeling that the limits of the royal power could not in future be overstepped by any minister without danger to his life, or by any king without risking his throne. Charles II. and his ministers were thus far perfectly agreed as to the present position of the constitutional question. Within these landmarks of the constitution, the ultra-royalist party could be allowed to have its own way, which it did without making any attempt to tamper with the foundations of the constitution. In considering the theoretical principles of the party, the practical ground of their rights was never forgotten, least of all in the Upper House. A restoration of the monarchy was understood to mean a restoration of the long-established prerogatives limited by the estates of the realm, as they had existed before the encroachments of the Stuarts. Magna Charta, the Petition of Right, and the old-established constitutional laws, were partly by word and partly by deed acknowledged as continuing in force. (2[a])

(2[a]) The Parliamentary history of this period in its intricate details is clearly told by Hallam, Const. History, ii. c. 11, 12 (cf. Parry, "Parliaments," pp. 533–587); for an artistic description of its complication with England's foreign relations, cf. Ranke, vol. iv. p. 174, to vol. v. p. 92. The Long Parliament of 1661 is the hinge upon which the question turns, whether party-passion is the more dangerous in the form of a sovereign legislative or of a political Government not limited by law, and whether a system of party is more dangerous in its effects upon the *King in Parliament* or upon the *King in Council*. Party legislation has certainly been more effective in its workings; but a Government by law made the mistakes of the legislation so perceptible even to the dominant party, that it was inclined to make concessions. Still more strongly did the English self-government work in this direction. In the sphere of the community unjust and oppressive laws were felt in a much greater degree than in a disciplined army of officials. Here lay a main root of the opinions that only slowly changed in the course of the Long Parliament. In the life of the counties, towns and parishes, the dominant class evolved from within itself a spirit of moderation, which an unprincipled monarchy did not understand how to spread about itself. The long duration of Parliament was originally intended to secure to the royalist party the full fruits of its influence. But in the consciousness of this security collisions very soon began between the Upper and the Lower Houses. In the years 1667–1670 party spirit reached its turning point. From that time forward the schisms gradually lead to a moderation, to which the bye-elections, which had become necessary after seventeen years, also conduce. At the close the retrospect of numerous impeachments of ministers and important laws for the protection of personal liberty presents a striking contrast to the feelings evinced at the beginning.

Charles the Second's Government is, in so far, a normal parliamentary Government in the more modern sense. All the legislation of this era is dependent upon an indisputable majority of legally elected Parliaments. No attempt was made at extraordinary legislation by the council; an insignificant ordinance against coffee houses was even recalled on account of doubts as to its being a constitutional measure. Just as indisputable was the right of taxation; no attempt was made to raise by indirect means tolls, benevolences, and forced loans. Parliamentary control of the administration and right of impeachment were exercised more effectually than ever. Formal encroachments on the part of the executive are much rarer than under the Tudors. The possibility of such proceedings was also in a great measure removed, for even the most extravagant supporters of the divine right of the Crown and of non-resistance did not desire, and would have scouted the idea of a Star Chamber and Court of Commission. The institution of a Court of High Commission was expressly forbidden, and on the restoration of the ecclesiastical jurisdiction, the express clause was inserted, that it was "not the intention to restore that court, nor to give validity to the Canons of 1640, nor to extend the authority of the Church."

And yet, as is generally acknowledged, since the days of the dishonourable John, England had not been worse governed than in this period of a normal parliamentary and ecclesiastical constitution. The true position of the kingdom, which certainly more than ever needed a royal mode of government, was that the upper classes, restored to the possession of their influence, only make use of this power for the systematic persecution of their opponents in both Church and State. This phenomenon was not new, but whilst formerly it had affected a few individual persons of high standing, it was now with legal consistency directed both against parties and classes. It had formerly its chief seat in the Upper House; but now pre-eminently in the Lower. But just in this point was seen how much the centre of gravity of constitutional rule now began to move towards the Lower House,

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and how much more dangerous the influence of parties could be upon the legislation and administration in a factious elective assembly.

There certainly was still a power which could put a check upon these party practices. The King, personally popular and influential, was again in a position to exert his royal right of protection in favour of the weaker party, and to regain the true rights of royal Government,—being all the more urgently called upon to do so, as he owed his throne quite as much to the persecuted middle party as to the persecuting party. What was required was the granting of the solemnly assured protection both in Church and State to a party, which as a majority in the Lower House in December, 1648, and which as the last remnant of the Upper House in the January of 1649, had manfully supported the rights of the Crown and the person of the King in spite of the violent action of the army. But for the second time at a crisis we discover the true spirit of the Stuarts. Ignoring his royal vocation, Charles II. once more discharged his God-appointed office with a degree of frivolity and falseness that has never been equalled in English history. With captivating manners, but at heart empty, unconscientious, and immoral, this Stuart used the throne primarily as a means of joviality and pleasure. During his rule, which lasted twenty-five years, the historian vainly looks for a trait of royal appreciation of the Church or the State, of institutions or of men. As he dishonoured the service of the Church by frivolous witticisms, so he degraded the peerage by his six bastards whom he raised to the ducal dignity; and thus the parties of the Upper and the Lower House were only important in his eyes according as they affected his comfort. The extreme selfish proceedings of the royalists and their press he endeavoured at times to stave off from his person, as troublesome to him. Later, any criticism on the conduct of his court was obnoxious to him ("that a set of fellows should inquire into his conduct" (Burnet). But the thought of the more serious duties of the Crown never occurred to him. He let factions and

ministers rise and fall or be impeached, while he trafficked with English interests to fill his coffers. The only faith that we can discover in his mode of action, is the faith in the hereditary nature of the Crown; the only dread, the thought of re-awakening the Puritan opposition. Whilst Charles I. politically undermined the belief in the Crown, Charles II. undermined it morally. The deficiencies in the constitution, owing to which such a mode of Government was rendered possible, will be seen from the following chapter. (3)

(3) The later short Parliaments of Charles II. are contemporary with the controversy to be discussed below (Chap. xlii.) as to the Protestant succession.

The third Parliament lasts from the 6th of March until the 12th of July, 1679, and is characterized by the violent feelings displayed in both Houses, and by the bill touching the exclusion of the Duke of York from the succession, which having been adopted in the Lower House by 207 against 128 votes, brings about firstly the adjournment and then the dissolution (Ranke, v. 93–111).

The fourth Parliament (from the 17th of October, 1680, until the 18th of January, 1681), was again characterized by vehement resolutions passed against the Papists, against the members of the Privy Council, and against the succession of the Duke of York.

The fifth Parliament (from the 21st to the 28th of March, 1681), was closed after the second reading of the exclusion bill in the Lower House (Ranke, v. 138–179).

CHAPTER XLI.

The King in Council and the King in Parliament.

With the Restoration the old structure of the State is again set up. The King is again surrounded by his smaller and larger circle of councillors; but in this period a change occurs in their mutual relations, to the prejudice of the Crown and to the advantage of Parliament.

I. **The Privy Council** is revived, as a natural result of the restoration of the Crown. It again consists of the great officers, lords and "others," whom the King summons to it. The great functionaries continue as enumerated in the rules of precedence issued by Henry VIII. At their head is still the *Lord Chancellor* who, since Lord Ellesmere (1603), is more frequently elevated to the hereditary peerage.

The *Lord Treasurer* passes into the new position of a directing minister of State and finance. Under Charles II., the Treasury, in the character of the supreme financial control, becomes permanently separated from the old Exchequer in its capacity as a general depository of revenue. The Treasury receives a new location in the Cock-pit, whence decrees, orders, reports and instructions proceed; the personal appearance of the Treasurer in the Exchequer ceases from this time. Under the influence of the party-system the custom is also introduced of dissolving the office into a commission of several persons. (*a*)

(*a*) The Lord Treasurer in this century frequently appears as the leading minister. But at intervals the administration of the office is carried on by a commissioner, as in 1612, 1618, 1635, 1641, 1654, 1658, 1659, 1660, 1667,

Under Charles I. a special *Lord President of the Council* was appointed; Charles II. had, in the interest of personal rule, left the office unoccupied, until in 1679 it became permanent.

To the great offices of State is now added also that of *Master of the Ordnance*, for the management of munitions of war, the head of which since 1603 received the title of general; after the Restoration, the office was regarded as a ministerial office, and by warrant of 1683, constituted in the way in which it has remained until our own times. (*b*)

More and more important does the office of the two *Secretaries of State* appear, under Charles II. with separate administrative departments. From them there further becomes separated off in 1666 a *Secretary at War*, for the financial administration of the army, in a somewhat subordinate position. (*c*)

The stat. 16 Charles I. c. 10, touching the abolition of the Star Chamber, is significant as affecting the position of the council. As no constitutional experience failed to produce its effect upon Parliament, the Restoration did not seek to revive the Star Chamber, which, in the significant words of the stat. 16 Charles I. c. 10, had now lost all remnants of administrative justice. The law declares the Star Chamber and every tribunal of equal or similar jurisdiction to be illegal, denies all jurisdiction, power, or authority of the council in all the

1679, 1684, and 1687. A new addition to the financial department is a *general excise office*, similar to that which was first formed in 1643 by the Long Parliament. By 12 Charles II. cc. 23, 24, the excise becomes an ordinary tax under a chief excise office in London.

(*b*) The Ordnance Office is connected with the attempts of the Stuarts to introduce a standing army. The warrant of 1683, places at the head a *Master-General of the Ordnance*, under him a lieutenant-general and four high officers, and in this manner the ordnance office continued down to 1854. The standing army (the so-called guards) who were retained after the Restoration, amounted at first to only about 5000 men; but in 1685 the number was increased to 8700, with an additional 7000 in Ireland. (As to the newly organized military system of the Restoration, cf. below, Chapter xliii.).

(*c*) The *office of Secretary of State* also has now still a somewhat fluctuating form. Whilst Elizabeth had, during the last years, kept Sir William Cecil as a sole Secretary of State; in the years 1616, 1617, we meet with even three Secretaries of State; after this time two is the regular number. There still continue reminiscences of the former less important office of cabinet counsellor. Under the Restoration their position as full ministers of State is indisputable.

hitherto customary forms (below, Chap. xlviii.), and threatens every official with heavy penalties, who shall take part in an attempt to renew that jurisdiction. These powers were henceforward exercised by the King's Bench, so far as they could be derived from a superintendence of the courts of law and the magisterial jurisdiction; but for the most important extraordinary cases the only method of procedure was by private bill, *bill of pains and penalties*, restitution, etc., which shows that these extraordinary powers have passed from the King in council to the King in Parliament. An important motive for retaining a corporate form of council was thus actually removed. For mere deliberative functions, the institution of smaller committees could not appear inappropriate. Even under Charles I. the beginning had been made by a *Council of War* and a *Foreign Committee*. At the commencement of the Restoration it was intended to form a number of special administrative departments. A document, probably of a date shortly after 1660, is preserved in the Record Office, which gives a list of the proposed committees.

1. A committee of *foreign affairs*, including the correspondence with the magistrates and other county officials.

2. A committee for the *Admiralty*, *military*, and *fortification* business, etc., so far as they are adapted for the council.

3. A committee of petitions of *complaint* and *grievance*, excluding those of a purely private nature.

4. A committee for *commercial affairs*, particularly for the colonies, including Scotland and Ireland.

The Secretaries of State are to form part of all the committees. Besides these established committees, extraordinary affairs, needing special deliberation, were to be treated by specially appointed committees, "as was hitherto customary." Such committees were to present written reports to the King, to be laid before his Majesty at the next sitting of the council. Of these projected departments only one council board was practical at that time, which, under the name of a department for foreign affairs, really discharged the whole business of Government. But after the fall of Clarendon, all was merged

in the diffuse cabinet Government of Charles II. The committee remained only a name for the confidential transaction of more important affairs in the King's cabinet, which soon afterwards received the name, and assumed the character of the "Cabal." Of the remaining committees only a Board of Trade attained a definite form. After Cromwell's commercial policy, it was not thought right to refuse trade and the colonies a certain degree of stable administration. By patent of the 7th of November, 1660, a council accordingly was created for *the general state and condition of trade*, and by patent of the 1st of December, 1660, *a council of foreign plantations*, partly with the functions of a minister of the colonies; in 1660 both were combined in a *council of trade and plantations*. In 1675, however, this department was again dissolved, and it was not until 1695 that a new Board of Trade was formed.

II. **The Upper House**, in which the bishops again take their places, on the 20th of November, 1661, assumes an altered character, owing to the large increase in the temporal peerage. Under James I. the number of the peers had been doubled, and at the close of the period it was trebled. The higher dignities conferred on peers, and the new creations are computed at 98 under James I., 130 under Charles I., 137 under Charles II., 11 under James II.; altogether 376 under the Stuarts, against 146 during the period of the Tudors. James I. created 62 new peers, Charles I. 59, Charles II. 64, James II. 8 (May, "Const. Hist.," c. 5)—altogether 193, against which were to be set off 99 extinct peerages. James I. for some time even sold the dignities of baron, viscount, and earl for the respective sums of £10,000, £15,000, and £20,000. These lords are no longer like the nobility of the Middle Ages; they are the heads of the gentry, who conduct the internal administration of the country, whose permanent position in the office of justices of the peace and the county militia politically elevated and morally reinvigorated the peerage from below. As early as James I., recognition had been obtained for the principle that a peer must be summoned for each par-

liamentary session; the position of the Upper House as the supreme tribunal in the land is thus re-established and strengthened. In the civil wars, with insignificant fluctuations, the attitude of the lords on both sides was dignified and commanded respect. They successfully vindicated their position as depositaries of the law of the land, on the 2nd of January, 1649, when the peerage, in spite of the onslaught of the army after the King's condemnation, showed its courage by unanimously rejecting the resolutions of the Lower House. From the time of the Restoration onwards the peerage proved itself the permanent organ of the ruling class; at first, it is true, going with the ultra-royalist current, but soon again appearing at the head of the opposition. By the numerous new creations of this period, fresh energy and fresh influence flowed from decade to decade from the counties into the Upper House, which, in the time of corruption and party intrigues, was the first to restore a moral support to Parliament, and gained a paramount influence by the continual ministerial changes. The peerage has now become the moderating element for the protection of the constitution, in the face of vehement party clamouring for change. (2)

III. **The Lower House,** during the period of the Stuarts, experienced only trifling changes in its constitution by the

(2) The constitution of the Upper House changes its character owing to the very numerous creations of peers. The peerage, which under Elizabeth was held with a tight hand, appears under James I. to be visibly increasing. In 4 James I. writs of summons are directed to one marquis, 22 earls, three viscounts, and 46 barons. A generation later writs to the Long Parliament are issued to one duke, one marquis, 63 earls, five viscounts, 54 barons, two archbishops, and 24 bishops; the whole number has thus increased to 150; the temporal peerage has already almost doubled. To the Long Parliament of Charles II. in 1661, there were summoned five dukes, four marquises, 56 earls, eight viscounts, and 69 barons; the number of the temporal peers alone is now 142. In 31 Car. II. the whole number (including fourteen minors and seven recusants) is 181, and in 1 James II., 178. The number of the bishops (26) remains unchanged. The foundation of the power of these new peers lies in the county self-government, and in their pre-eminent position in the local military and police administration, to which their position as hereditary counsellors of the Crown corresponds in the central administration. With the radical abolition of all the remains of feudalism by 12 Car. II. 24, their newer position appears still more unalloyed and decided. In 22 Car. II. the King, renewing an old custom, again began to take part personally in the proceedings, without, however, enhancing the dignity of the proceedings by his high presence.

admission of the county palatine of Durham, and by another increase in the representation of the boroughs. In the Parliaments of the Republic, the towns, from possessing four-fifths of the votes in England, had been reduced to one-third, but were now again represented in greater number than before. After the Restoration, country gentry, Church, and Crown all agreed to keep down the spirit of independence that was showing itself in the middle classes of the towns. The Corporation Act (13 and 14 Car. II. c. 2), sufficed for this purpose for a number of years. But during the Long Parliament of Charles II., opposition in this quarter was again discernible in the several by-elections. Thus situated, Charles II., in 1681, resolved, in the interest of court influence, still further to cripple the constitution of the boroughs. By the writ of *quo warranto* the new principle of a "forfeiture of the municipal constitutions" was applied in cases of abuse or informality. The charters were cancelled in great numbers, to be replaced by new ones of an oligarchical nature. James II., continuing this campaign, created everywhere small select committees, which, like the civic offices, were to be revocable at the pleasure of the Crown. In London alone, Jeffreys robbed 1900 enfranchised freemen of their suffrage, and was nevertheless blamed by the King for not making a more thorough clearance. In a few years 200 new charters of this description were issued. Including the mutilated municipalities, the number of members for England and Wales after the restoration was 512. (3)

(3) The constitution of the Lower House was increased under James I. by twenty-seven, under Charles I. by eighteen, and under James II. by six members. The excessive number of borough representatives had for centuries been a legislative problem. It had arisen at a time when the Commons, as yet in a subordinate position, assembled principally to vote the taxes. The Lower House was now a corporate unity, the members of which, after long political struggles, had for a long time considered themselves no longer merely as delegates of their constituencies, but of the whole country. With the Stuarts begins a general tendency to a transformation of the municipal communities by incorporation. Even James I. considered a social organization and creation of close boroughs a very "politic" measure, and in the twelfth year of his reign, when Dungannon, in Ireland, was made a borough, it was declared by his judges that the King could by his charter so incorporate the city in the form of select classes and a commonalty, that the whole body had the right to send members to Parliament, whilst the exercise of the right was at

Apart from this, the constitutional struggle greatly elevated the self-reliance of the Commoners. The local government system became consolidated in the parishes, and allowed the middle classes, who took part in it, to exercise a stronger influence upon the parliamentary elections. Besides this, the enormous suppression of the poorer electors in the municipal constituencies by the new corporation charters assimilated the relations in town and country to each other in favour of a uniform influence of the gentry in both borough and county. The great extension of the magisterial office especially strengthened the legitimate influence of the gentry, began to level the difference between the greater and lesser nobility, and to give to the whole of the more highly educated and wealthier classes the common feeling of a dominant class. In the intellectual life of the people the internal effect of the Reformation was now everywhere manifest. It is accordingly easy to understand, how, after the Restoration, the House of Commons was enabled to proceed with an amount of self-reliance till then unknown. During its eighteen years' duration, the Parliament, much against Charles the Second's

the same time confined to the select classes. After this fashion, under James I. and Charles I., seventeen old boroughs were reinstated in their lost parliamentary franchise; and four new parliamentary boroughs were created. The Parliament itself, which since James I. had gained the exclusive right of deciding its own elections, now also acknowledges in a resolution of committee of the year 1623 the principle that a limitation to a narrower circle of electors could validly take place by "prescription and custom, whereof the memory of man runneth not to the contrary." In another direction, in a celebrated committee of the year 1640, under the presidency of Serjeant Glanville, the old maxim that every one paying scot and bearing lot was entitled to the franchise, was again recognized to be the regular rule, and applicable in every doubtful case. After the experiences of the revolutionary period the question had now become a highly important one which on all sides now began to be estimated aright. The municipal elections opened to the landed gentry in their magisterial and social position an almost greater personal influence than the county elections, yet not to every gentleman, but only to such as to a certain extent respected the interests of the towns and their feelings, and endeavoured to win them over. They remain accordingly the chief hearth of political and dissenting opposition, from which the provincial opposition drew its chief strength. Instead of a reform the Crown, however, only gives them the mutilation of the right of suffrage by charters framed upon oligarchical lines. Moreover, it was reserved to the Crown to make changes from time to time in the new charters, at its pleasure, through Government commissioners. Instead of restoring a self-relying and independent citizenship on lines analogous to those of the county system, the Stuarts practiced their kingcraft even upon the towns.

intentions, had educated a body, the most illustrious members of which felt themselves the equals in political experience and social position of many of the peers recently created from among themselves. Thus may be explained the numerous disputes between the two Houses concerning competence and etiquette.

With respect to the finances, the influence of the Lower House appears materially enhanced. In 1626, the Commons succeeded in establishing their precedence in the question of money bills, with regard to which they figure as the solely voting part of the legislature. This claim was further strengthened by the abolition of the hereditary feudal revenue of the King. The concentration of the whole of the direct State taxes by a uniform assessment, combined with the new requirements of the State and the army, but most especially the bad financial economy under Charles II., conduce to a constant extension of the right of voting the money bills. After 1664 tenths and fifteenths are no more mentioned, but the old republican mode of assessing land and income tax *in concreto* is again resorted to; Cromwell's rectification of the tax-rating and assessment lists was accordingly retained. Into this thorough taxation-assessment, ecclesiastical property was likewise drawn. Since the special money grants of the clergy had long since lost their peculiar character, it was only a somewhat delayed consequence, that the outward form also of the grant in Convocation was in 1664 abolished by means of a simple agreement between the Lord Chancellor and the archbishop, in return for which, as a matter of course, the right of suffrage in parliamentary elections was conceded to the clergy by virtue of their freehold tenure. By 16 and 17 Car. II. c. 1 the parliamentary subsidies were for the first time raised according to this new system. The long labour of reuniting the clergy with the laity had involuntarily attained this result. Still more durable was the influence of the Lower House owing to the introduction of the so-called appropriation clauses into the money bills. Amid all the intrigues of the court and of parties, a change was effected

by 17 Car. II. c. 1, according to which a clause of expenditure is annexed to the money grant, by which the Lower House assumes the control of the expenditure-budget of the State, and thus gains a less apparent but a permanent influence upon the course of political administration. (3ª)

It is characteristic, that both Houses, when at the height of their loyalty, are bent with a hitherto unheard of zeal upon establishing and enlarging their personal privileges. In 15 Charles II. the House recurred to the unconstitutional criminal proceedings taken against Sir John Elliot and his associates. With the complete concurrence of the Upper House, the judgment delivered at that time by the King's Bench was declared null and void, and the unconditional irresponsibility of the members for their speeches and pro-

(3ª) Oddly enough this change in the budget was brought about by the aid of an intrigue at court. Sir George Downing, one of the tellers in the Exchequer, suggested to Charles II. that a proviso should be added to the impending bill of supply, "that all moneys to be raised by the bill should be exclusively applied to the purposes for which they were voted." By this means the disposal of supplies would be taken from the Lord High Treasurer, and the King would be enabled personally to conduct the business of the Exchequer, so that the Exchequer would at once afford the best opportunity for investing moneys, and in consequence would become the greatest bank in Europe. This was connected with the custom of raising, for the current needs of the Government, loans from bankers (at that time the Goldsmiths' company, in London), upon the personal credit of the King and the Lord Treasurer. The King probably wished by this clause to evade the obligation of employing the moneys voted for the repayment of such advances. The ministers strove to get the dangerous innovation annulled ("Life of Clarendon," continuation, p. 315, *seq.*); but the bill had already passed the Lower House, and though it was delayed by the Lords, it could not be thrown out, without risking the whole vote (£1,250,000). The King accordingly declared that the clause had been proposed with his sanction, and the Act (17 Car. II. c. sec. 5) really passed with the proviso, that a separate account should be kept of the moneys raised in accordance with this act, distinct from the King's other revenue, "and that no moneys leviable under the act should be issued out of the Exchequer during the war, but by order or warrant, mentioning that they were payable for the service of the war." In the ensuing year the Commons again voted the supplies with the same disagreeable proviso, to which the King agreed with a bad grace, and promised to appoint a commission under the great seal, which was indeed, *pro forma* appointed. But in the ensuing year was passed the stat. 19 Car. II. c. 9, "an Act for taking the accounts of the several sums therein mentioned," by which the Lower House effectually secured a power that had been occasionally exercised in the fifteenth century, of examining into the special application of the public revenue, and thus exercising the right of jointly controlling the expenditure budget. The clause of appropriation became from that time forth more and more a standing formula, and in the eighteenth century with some exceptions was permanently inserted.

cedure in the House was recognized by express resolution (Hatsell, "Preced.," i. pp. 86, 208 *seq.*, 251 *seq.*). Liberty of speech has since that time never again been called in question.

The relation of the Crown towards the greatly increased pretensions of Parliament was in no wise so favourable as the ultra-royalist theories led men to expect. However, in spite of the abolition of the Star Chamber and the Court of High Commission, there was still many a loophole for the effectual exercise of the King's influence in his spiritual supremacy and temporal prerogatives; by the appointment of the council and the judges of the realm, and by other rights of appointment in both Church and State, by grants of favours, by personal influence with the members of both Houses, and with important local officials. The future of the monarchy depended upon the use which it made at this time of its personal rights. But Charles II., fatally misjudging the future, exercised these rights in a manner which has covered his name with everlasting obloquy. The narrower the sphere of a possible use of the royal prerogatives had become, the more unconscientiously was it exercised by Charles II. and James II.

1. *The right of appointment vested in the council* leads in the hands of Charles II. to the transformation of an honourable council of ministers into an unprincipled cabinet. James I. had, after the death of Elizabeth's old ministers, abandoned the custom of the continuous transaction of State business in the council in order to enforce his private ideas with respect to Church and State in confidential cabinet deliberation. Charles I., himself irritable and inexperienced, carried on with heedless advisers this mode of government, which at every critical moment gave the Queen and the courtiers a deciding voice. But under Charles II. the second era of a cabinet government begins, which is remarkable as the personal creation of the King. Even after the judicial powers of the council had been cut away root and branch, there was left to this cabinet the decision as to important measures of domestic policy, and the whole province of foreign affairs, which latter, from their very nature, could not be dealt with

according to legal principles and parliamentary laws. The use made of these under the Cabal ministry, as well as under Shaftesbury's and Danby's administration, is known to history. In the European complications of that time, France pursued no other aim but that of hindering the consolidation of the constitutions in the neighbouring states, weakening their participation in European diplomacy, fostering their internal dissensions, and directing the personal interests of the several monarchs to dynastic alliances and treaties of peace. The great Louis actually succeeded in doing this in England. The position of foreign affairs had, in the second half of the seventeenth century assumed a more complex form than in the first half. The question of Protestantism stood no longer alone in the foreground, but was intermixed with questions of the European balance of power. The natural alliance of England and Holland was at times opposed by a petty spirit of trade jealousy. Here was a fruitful soil for diplomatic complications, for which Clarendon's dismissal was the signal. When in 1668 the King found his coffers empty and the temper of his Parliament doubtful, he devised the plan of entering into secret negotiations with the King of France, which might lead to the furnishing of money supplies. In the course of the confidential correspondence, the question of religion became mixed up with the money question. In January, 1669, the King summoned Clifford, Arlington, and Arundel to a confidential conference at the Duke of York's, and declared how painful it was for him not to be able to confess his true faith. With tears in his eyes he entreated them to advise him as to the best manner of enforcing the Catholic religion in the realm. This negotiation leads, after the lapse of a year, to the secret treaty with France (1670), in which it is left to Charles to choose the time that shall appear most suitable to him for publicly declaring himself a Catholic. On the other hand France promises an annual sum of £200,000 for defraying the war expenses, for the promised assistance against the Dutch, and for keeping down the dissatisfaction that was to be expected in England. Both

parties give up all claim to independent peace negotiations (Ranke, iv. 358 *seq.*) When the French subsidies are exhausted, Charles again demands, in the year 1674, a fresh subsidy of £400,000, with the intimation that otherwise Parliament would have to be convened, which would at once declare for war in alliance with Holland against France. Louis, however, on this occasion, pleads want of money, and grants only about one-fourth of the sum demanded, on the King's promising to prorogue Parliament from November, 1674, to April, 1675. In the later negotiations (1678) Charles II. adheres to the policy of selling his neutrality at the highest price which could possibly be obtained from France. Whilst the increasing greatness of France fills Europe with alarm, and Parliament, ready for war, in 29 Car. II. declares for an alliance with the States General, the King ungraciously replies to the address, "that it was a matter ill calculated for the interference of the House, which was encroaching upon his prerogative of making war and peace." In this state of affairs, Louis accords a further payment of 2,000,000 livres for the year 1681, and an annual allowance of 500,000 crowns for the two following years. Whilst the King declares to Parliament his readiness to begin a war with France, and demands subsidies for this purpose, he is at the same time engaged in selling his services to the French King at the highest possible price. The legal responsibility of the ministers for violations of law certainly did not suffice for treason on the part of the King himself. It can easily be understood how Parliament came to extend impeachments of ministers to their political conduct, to the "honesty, justice, and ability" of the ministerial administration, a principle which was first laid down in the impeachment of Danby, and led to the idea of a so-called political responsibility of the ministers to Parliament. (1)

(1) The cabinet and the foreign policy of Charles II. was the development of a system of earlier invention. James I. had more and more abandoned the solemn sittings of the council, regular deliberations with the assistance of the judges, and the formal recording of the proceedings. Charles I. had during the civil war at last given up all formality. The loophole which was

2. *The right of appointing the judges* had been already made use of by Charles I. for filling the bench with men of confidence and adherents of absolute sovereignty, and, by the influence of the cabinet and the court for making the judges instruments of an unconstitutional Government. The second period of the Stuarts in this matter likewise went to greater lengths than the first. After 1665, the revocable appointments of judges were resumed, and, after Clarendon's dismissal, the King thought he need put no further constraint upon himself. During his reign three lord chancellors, three chief justices, and six judges were dismissed, notoriously for political reasons, and, on the other hand, the most important places were filled by pliant minions of power. The maxim of Government, which Bacon had applied to Henry VII., had returned, viz. "he governed his subjects by the laws, but the laws by the lawyers." The more cunning devices of Charles the Second tried to prevent these manipulations of justice from becoming too notorious. In the action against Sir S. Barnardiston, however, a procedure was employed which was patent to every one, by which the King, immediately before the decision in the appeal court, appointed as members of the court sundry counsel who had conducted the prosecution. When the proceedings touching the pretended papist plot began, Chief Justice Rainsford was dismissed to make room for Scroggs, who proved himself entirely worthy of the confidence reposed in him, by continuing the false charges first in one direction and then in another, and by freeing the Duke

here afforded Charles II. left the whole of foreign policy open to an irregular treatment. Alliances, treaties, and political combinations in foreign affairs were the proper field for the frivolity of his character. In Charles II. there was added to the perverse family traditions the influence of French education and manners. A thorough description of these foreign affairs (Ranke, iv. 196–496; v. 1–92) presents extraordinary difficulties on account of the complication of the European and cabinet intrigues with the party-system of Parliament. As to the first attempts at a reunion with Rome *cf.* Ranke iv. 232–256; as to the origin of the Test Act, iv. 411–425; as to the secret Treaty with France of 1670, iv. 358–376. It was only in the later complications that Louis XIV. came into immediate connection with the opposition in Parliament (Ranke, v. 55–73), as to which Charles was quite as much deceived as the Parliament was by him. The total amount of the French payments to members of Parliament is said, however, not to have exceeded the sum of £16,000.

of York from a serious charge, by the sudden dismissal of a grand jury. As he had, however, completely lost his credit by this notorious scandal, it was found to be expedient to give him a successor, who had, on the same occasion, proved himself quite as unconscientious. Pemberton was made chief justice, chiefly, that he might preside at the trial of Lord Russell, whom he certainly brought to the scaffold without, however, satisfying all the expectations of the court. He was accordingly soon replaced by a successor, on whom the King could even more implicitly rely. The judicial decision most important for the King at this time was the annulling of the municipal constitution of London and of the borough charters. For this purpose, after the dissolution of the last Parliament (28th March, 1681), the proceedings began by a writ of *quo warranto*, under the conduct of Saunders, the most adroit special pleader of his day. After the case had been drawn up with every artifice, Saunders was appointed Chief Justice of the King's Bench (Amos, 141, 263). As an extra precaution, Charles personally exhorted the judges that they should deliver judgment in his favour, whereupon the city was condemned to lose its municipal privileges and to pay a fine of £70,000. James II. was still more shameless, and in three years went so far as to dismiss twelve judges, and to raise that personification of dishonour, Lord Jeffreys, to the chief justiceship of the King's Bench, to the post of Lord Chancellor, and to that of president of a kind of pseudo Court of High Commission. Sir Edward Herbert and Sir Francis Withers were in 1685 dismissed from the King's Bench on account of their refusal to issue a legal decree at the King's behest; Chief Justice Jones, Chief Baron Montague, and the Judges Charleton and Nevil were dismissed in 1686 on account of their scruples as to the King's power of dispensation, and the judges Powell and Holloway in 1688, on account of their vote in the trial of the seven bishops. On the decisive question of the dispensing power, James first of all obtained a legal opinion as to his power to suspend the Test Act. Then, for the sake of form, a prosecution was commenced

against a Catholic officer in the King's Bench, which Court, after the removal of the opposing judges, and with the aid of fresh appointments (among which were those of two Catholic judges), now at length arrived at the decision, that the laws were "the King's own laws," from which the dispensing power of the King was deduced. James called this a simple measure, in order that the judges should be "all of one mind." (2)

With this staff of judges, the political trials were now conducted according to instructions from court, and thus were the unsettled principles of high treason, sedition, and the laws and ordinances touching the press manipulated. The chief handle for such action was found in the old indefiniteness of the laws affecting high treason, which indefiniteness was increased by the clause in an Act of 1661, to the effect that "printed matter, writing, sermons or malicious and deliberate speeches" were to be regarded as a sufficient evidence of fact. Just as elastic was the notion of sedition since Clarendon had laid down that the publication of a seditious work was equivalent to bringing an army against the King's throne. Amongst others, the trial of the seven bishops was set on foot on a charge of sedition, the notion of which, to use an expression of Lord Guildford, was of the "nature of soft

(2) The appointments to the judicial bench returned with the restoration to the old forms. A monograph on the Constitution under Charles II., by Amos (London, 1857), gives the details of the administrative conditions for the most part correctly, though somewhat exaggerated by the manner of grouping them. After 1665 Charles II. appears to have made use of the long prorogation of Parliament, quietly to reintroduce revocable appointments *durante bene placito*. In quick succession Lord Chancellor Clarendon, Shaftesbury, and Bridgeman, Chief Justices Rainsford, Scroggs, Pemberton, and six justices were dismissed, notoriously for political reasons. Apparently for the same reasons the judges Atkyns and Leeke gave in their resignation (Foss, vii. 4). In the case of Atkyns the reason for his dismissal was that he had on circuit contradicted the opinion of Scroggs, "that the presentation of a petition for the summoning of Parliament was high treason, and that the King could by ordinance ordain what he pleased." Pemberton's dismissal was followed by the still more scandalous appointment of Saunders. After the death of Chief Justice Saunders, Jeffreys was appointed chief justice primarily for the conduct of the political trial of Sidney. On the occasion of the impeachment of Lord Danby Lord Jeffreys also performed the still more important service of freeing the minister from arrest, on bail, without setting forth any reasons —"the first dumb judgment in Westminster Hall," as it has been called by a later Solicitor-General (Amos, 56).

wax." But most elastic of all was the notion of libel. The interpretation of such notions was supplemented by the press laws of the time. The leading statute 13 and 14 Car. II. c. 33 was only to remain in force for three years, but was twice prolonged until 1679. After it had expired, a new ordinance appeared in the London Gazette on the 17th of May, 1680, and was the object of violent attacks in Parliament. Yet, in the stream of reaction of the year 1685, the old press laws were again revived. In consequence of the large powers appertaining to the judicial office, the criminal sentences, especially for libel, overstepped all bounds. Not only were fines of £40,000 and similar sums imposed, but even lashes with the cat-o'-nine-tails (Johnson, a clergyman, was condemned to 317 lashes for libel, cf. Amos, 253). Judgment was given in favour of the Duke of York for damages of £100,000 on three different occasions.

From this judicial staff proceeded that brutal intimidation of juries, which characterizes this period. The natural result was the passing of the Habeas Corpus Act, and the unconditional acknowledgment of the irresponsibility of juries. In a famous decision of 1679, the courts of common law at length recognized that the jurors were not responsible for the legality of their verdict. Under James II. the acquittal of the bishops, in the face of their prosecution by a despotic monarch, produced a permanent conviction, that in an unanimous verdict there lay the strongest guarantee, which a judicial constitution can afford against despotism and party passion. The whole body of the judges, however, was so corrupt, that, after James's expulsion, only criminal prosecution and dismissal could be resorted to. After these experiences it even did not appear to be easy to declare the judges irremovable by law; rather was the more attention paid to impressing the legality of the Government, not merely upon the consciences of a number of paid justices, but upon a still broader combination of the judicial office with the propertied classes. (2[a])

(2[a]) An impediment to such an administration of justice was still found in the jury. According to a clever plan, which he had continued for

3. *The personal influence of the court* upon Parliament, and upon the appointments of other officials, was still extensive, and was exercised by Charles II. in a manner which gained for the Long Parliament the name of the *Pensionary Parliament.* Amidst such surroundings it was really difficult to maintain personal integrity in a parliamentary office, or, in party formations, anything like constancy. The list of the

years, and in which Chief Justice North, his brother, and a Turkey merchant were employed, together with a third brother, Charles II. by unworthy means succeeded in appointing subservient sheriffs for London, with a view to the summoning of the grand jury. In the correspondence on this subject the name of the object is directly declared to be the removal of that monster which in the years 1680–1682 had raged in the city of London under the name of *Ignoramus* (that is, the ignoring of bills by the grand jury). The question for the Crown was, whether treason and sedition were still punishable in London and Middlesex or not. The details are given by Amos, 266 *seq.* One of the objects of annulling the municipal charters was to remove the independent sheriffs and magistrates, who had to draw up the lists of the jurors liable to serve. In November, 1683, by a jury under the new system, Algernon Sidney was actually brought to the scaffold. In the midst of such a state of things the Act of *Habeas Corpus* was passed, after various attempts at the measure in the years 1668, 1670, 1674, and 1675; cf. Amos, pp. 180–190. Lord Shaftesbury must be regarded as the prime author of this Act. The reason for its acceptance by Charles II. was that he was just about to dissolve Parliament, to attain more favourable elections against the Bill of Exclusion. Under these conditions the bitter words of Marvell at the close of Charles the Second's reign are readily understood, "what French counsel, what standing armies, what parliamentary bribes, what national oaths, and all the other machinations of wicked men had not been able to effect, was more compendiously acted by twelve men in scarlet" (Amos, 261). But still more shameless does this royal system appear under James II. Lord Chancellor Jeffreys, who may well be regarded as an authority upon such questions, describes his colleagues of that time with his accustomed frankness, "as for the judges, they are most of them rogues" (Foss, vii. 201). The uncongenial task of sketching the life of this Chief Justice, Lord Chancellor, and President of the Court of High Commission, is again undertaken by Foss, vii. 226, *seq.* After James the Second's expulsion not one of the ten justices who were then in office was found worthy of being retained; Lord Jeffreys was condemned to outlawry and the confiscation of his goods, and six others were expressly excluded from the Act of Indemnity. Under these circumstances England learned to appreciate the value of an honorary magistracy in self-government, which granted to the official, in spite of his revocable appointment, a full judicial independence by virtue of property. After the Restoration had removed the oppression which Cromwell's military governors had practised, the judgments of justices of the peace, in spite of the somewhat patriarchal exercise of their powers, and their excessive rigour in dealing with poachers, were still regarded as an upright justice in a corrupt time. Among the abuses by which James II. characterized his short reign, is to be reckoned also the systematic consistency with which magistrates, who had shown a want of complaisance to the intrigues of the court, were struck off the lists, but without any particular result. The office of justice of the peace and the jury passed unspotted into the eighteenth century.

recipients of pensions as a sort of official salary, includes the names of the first men of the day. At times there appears to prevail also among the opposition only belief in the material value of money and office, as the one great object of the time. To the great public offices in those days were attached salaries, which amounted from one to two per cent. of the whole State revenue; greater than the income of the richest lords. The struggle for office, acted and reacted upon by the intrigues of parliamentary parties, became thus a struggle for life and death, and round the leading men of the moment were gathered a number of intimate friends, who clung fast like polypi to the State treasury. All that was required for office was a confession of faith in the dominant faction, a readiness to further their nearest aims and ends, adroitness in intrigue, and a quick perception, in order to be able to descry the change of parties at court and in Parliament at the right time. In like manner, the internal administration of this period left behind it the impression, that the trustiness and honesty of the central government were not to be expected to emanate from the Crown and the court, but from Parliament, and most especially from the character of the nation. In opposition to the court party, a "country party" had become formed. The council, though internally broken up, enters, in the persons of the individual and responsible ministers, into more apparent relations with the majorities in the Parliament, in which also the growing participation of the Lower House, especially in the offices of Secretary of State and in the Treasury Commissions, is also visible. (3) The transition to the system of party government is throughout visible.

(3) The general character of the administration and the bureaucracy may be explained by the deeply rooted animosity displayed by the parties, between which the bureaucracy stands without finding any support in the Crown. It is characteristic of the programme put forth by each party that the name of the King and the will of God have never been more common in the mouths of men of political and ecclesiastical authority than under this dishonourable system. The character of the politicians and officials of this time is described by Macaulay in his "History," chap. ii., as follows: "Their character had been formed amidst frequent and violent revolutions and counter revolutions. In the course of a few years they had seen the eccle-

siastical polity of their country repeatedly changed. . . . They had seen hereditary monarchy abolished and restored. They had seen the Long Parliament thrice supreme in the State, and thrice dissolved amidst the curses and laughter of millions. . . . They had seen a new representative system devised, tried, and abandoned. . . . They had seen great masses of property violently transferred from Cavaliers to Roundheads, and from Roundheads back to Cavaliers. During these events no man could be a stirring and thriving politician who was not prepared to change with every change of fortune. . . . One who, in such an age, is determined to attain civil greatness must renounce all thought of consistency. . . . He catches without effort the tone of any sect or party with which he chances to mingle. . . . There is nothing in the state which he could not, without a scruple or a blush, join in defending or in destroying. Fidelity to opinions and to friends seems to him mere dulness and wrongheadedness. Politics he regards, not as a science of which the object is the happiness of mankind, but as an exciting game of mixed chance and skill, at which a dexterous and lucky player may win an estate, a coronet, perhaps a crown, and at which one rash move may lead to the loss of fortune and of life." The wretched state of affairs that ensues, and observation of the fact that by the dissolution of the council only the influence of Parliament was enhanced, appears in 1679 to have obtained a hearing for Sir W. Temple's plans of reform. The council is for the future to consist of thirty members, of whom one-half are to be high state officials; the other half to be appointed from among the chiefs of the opposition, both in the Upper and in the Lower House. The members shall have a joint income of £300,000, in order to "balance" the Lower House, which was at that time estimated at £400,000. As a counterpoise to both court and Parliament there shall accordingly be formed again a standing political body, and the statesmanlike originator of the scheme hoped that the responsibility of the business and the deliberation would again engender a corporate spirit. But for an active governmental body, the number of the members was too large; at all events the attempt after three such reigns came too late for England. Neither the King nor the parties were in earnest. There was at once again formed of this council a secret committee, and the whole institution had after the lapse of a year nothing more than a nominal existence (Ranke, v. 101 *seq.*; Macaulay, Essay on Sir W. Temple).

CHAPTER XLII.

The Expulsion of the Stuarts.

In the miserable state of the epoch of the Restoration, the first symptoms of an amelioration became apparent in the life of the communities in town and county. Firstly, it was the old landed gentry, rough, stolid, and full of prejudice, but yet full of zeal for the honour of the nation, in whom indignation at such a method of government found expression. In the boroughs, the oppressed puritan spirit gradually began to stir. The royalist party had wished to restore an ideal taken from England's past. Their ideal of a monarchy was derived from the glorious days of good queen Bess; instead of these, a Stuart had been restored with a corrupt court and an unprincipled bureaucracy. There were many who still believed that the King was only entangled in the meshes of a small number of wicked men, and thus estranged from his faithful people, and that the deception could not last. But yet it lasted, and a bad ministry was succeeded by a worse. Every exclusive acquisition of power by any party was followed by a period of disappointments. The neglected Cavalier, the persecuted Presbyterian, and the dismissed officer of the army, had each his own peculiar grievance and found himself in a worse position than ever before. Charles the Second's government was not modest in the demands it made upon the taxpayers. Of the employment of the people's money, of the negotiations with foreign countries, of the immoral state of things at Westminster, enough was heard in the counties

to awake a strong mistrust. Such feelings could only indirectly and sporadically affect Charles the Second's Long Parliament by means of by-elections; but, from the year 1665 on, they gradually increased, and showed themselves in the judicial proceedings. Attention was more drawn to the abuses of the administration, national grievances again revive, and impeachments of ministers and high officers return again, and down to the close of the period have attained the hitherto unheard-of number of forty. It is the perennial spirit of legality and equity, which is ever renewed in the independent activity of this nation, and in the daily exercise of the magisterial office, especially in the judicial and police administration. In the social life of the community, that party spirit, which separates the established churchmen from the dissenters becomes gradually quieted down. Both are still united in their detestation of papistry, that irreconcilable foe of the Established Church and of the parliamentary constitution. The royalists acknowledge, though with much reluctance, that their non-conformist opponents may still be "religious men" and good subjects. In opposition to the abuses of the administration, a sense of legal liberty again returns in the Parliaments of 1679 and 1680, which reminds us of the commencement of the Long Parliament of 1640. Disregarding the doctrines of Oxford, the Parliament again demands a government "according to law." The servants of the King must obey the laws; the King must neither excuse them from observing the law, nor pardon a minister who has been condemned for its violation. The taxes must not only be voted by Parliament, but their employment also be regulated and controlled by Parliament. No one must be arrested except upon special and legitimate grounds, nor detained in arrest except by the decision of a judge, nor condemned otherwise than by the verdict of an independent jury. Amidst all the changes and intrigues of parties there is preserved a spirit of civil liberty, which with the Habeas Corpus Act, the irresponsibility of the jury, the right of the Lower House with regard to the budget, and the struggle against a censorship of

the press, enforces a new Magna Charta, which is this time won not by the barons, but by the wider circle of the gentry, and mainly by the Lower House. With civil order the sense of civil liberty returned. After the extreme parties both in Church and State, under bloody Mary, Strafford and Archbishop Laud, Cromwell and the Puritan army, had become worn out and had finally shown their impotence, more liberal ideas at length established the opinion, that conceptions of God and of divine things and political conceptions of the civil power should be subjected to no absolute veto by the censorship of the press. The abrupt change in its application at last overcame the censorship in principle, so that it is from henceforth only retained by Crown and Parliament as an exceptional measure, to be applied under extraordinary circumstances.* It is this spirit which, in spite of all party errors, both internally and externally, at least strives after what is right, and which makes this time an era of "good laws and bad government," as it has been called by Fox. But the right bounds are once more overstepped.

The bill for the exclusion of the Catholic succession, agitated

* Its application in the reverse direction caused the fall of the censorship of the press in England. Charles the First's Cæsaro-papism had introduced the most comprehensive system of press laws by decrees of the Star Chamber of the 11th of July, 1637. In the war against Charles I., however, the Long Parliament continues the practice of the Star Chamber. In the year 1643, similar ordinances were issued by both the antagonistic Parliaments, and censors appointed. After the King's defeat, Lord General Fairfax and, in later times, Cromwell carried out the ordinances of Parliament. In 1653 an order of council enjoined that no public news or communications should be published without the leave and approbation of the Secretary of State. In 1654 and 1656 new commissions were appointed, with more rigorous measures against political writings, by which, however, Cromwell endeavoured to moderate the thirst for persecution in religious matters. After these rules had been enforced for twenty years in an adverse sense, a statute 13 and 14 Charles II. c. 33, with a rigour which is characteristic of the Restoration, essentially repeated the ordinances of Parliament relative to the printing licences. The number of master printers was restricted to twenty; they must give security, and on demand of the censor give up the name of an author. The printing places for books are London, York, and the two university towns. This law was only to remain in force two years, but was twice prolonged until 1679; and then by ordinance of the 17th of May, 1680, it was again renewed after violent opposition in Parliament; then in the reaction of 1685, it was again prolonged for a further period of seven years; finally, for two years, by 4 William and Mary, c. 24, until 1694, in which last-named year the censorship was finally extinguished.

for by the minority, led after 1681 to dissension and reaction. The opposition had boldly advanced so far as to threaten the hereditary monarchy. And here for the first time that party agitation which has periodically repeated itself down to our times becomes prominent. It developed a hitherto unheard-of election struggle, in which the rival parties figure as *petitioners and recusants.* The party passion of the opposition called the royalists Tories, a word derived from a Catholic party sect among the common people in Ireland; whilst the country party called their opponents Whigs, a name taken from a low and extreme class of covenanters. Men soon became accustomed to these mutual nicknames, chosen in the heat of the struggle by each party for its opponents, and they have been retained down to the present day. The supporters of exclusion (petitioners), however, are in the minority, attacking as they did the basis of the prerogatives and the source of the privileges of the upper classes. The clergy, deeply interested in the question, wage an actual crusade against these principles. Once more the doctrine of passive obedience, of the unchangeable hereditary right of the Crown, of the divine origin of the patriarchal descent of the monarchy, resounds from every pulpit. The London Gazette is again full of addresses of loyalty. The Crown quickly took advantage of this favourable turn of events, to strike a decisive blow at the municipal constitutions, which at that time were considered as the chief impediment in the way of the influence of the court upon the Lower House. Instead of encountering a real evil in a legitimate way, the Stuarts preferred to make confusion worse confounded by attacking the internal life of the towns, and made use of the corrupt benches of judges for the purpose of annulling the municipal charters. The judgment passed on London was followed by similar "informations" against other towns; most of the towns anticipated the attack by voluntarily surrendering their charters, in the place of which they received new ones "after a conservative pattern." The justices of assize especially abused their official powers to this end. Jeffreys, on the

northern circuit, "made all charters fall before him like the walls of Jericho, and returned to London laden with surrenderings, the spoils of the towns." **

Amidst this movement, James II. ascended the throne, under circumstances which remind us of the accession of Mary Tudor. The great majority of the people were satisfied that the regular hereditary succession, and not the adventurous plans of a new doctrine, had gained the victory. James's first addresses caused great joy in the breasts of those who now called themselves "the faithful portion of the nation." The University of Oxford promised once more obedience without any limitation or reservation. The House,

** The position of the parties on the accession of James II. requires some explanation. The specifically royalist party of this period had as an extreme agitating background the Roman Catholic faction; the radical opposition contained the remains of the republican party. In order to gain influence with the landed classes, which for the most part were attached to the present constitution, the one party had been obliged to emblazon the "Monarchy," the other "Protestantism," upon its standard. These powerful watchwords never failed in their effect at elections. The efforts of the opposition, which now demands civic freedom and protestant tolerance, are personified in men like Shaftesbury, William Russell, and Algernon Sidney; of whom the two last named, through the judicial murder contrived by Charles II. himself, became martyrs to the liberty of their country. But this opposition had to contend with the great difficulty that the treasonable proceedings at court, and the plots to overthrow the Established Church, were only known to the leaders, and to these only in part; that the high church party would not believe in them; and that they could not be clearly and in detail laid before the constituencies. The opposition had in this critical position and in its extravagant ardour, made serious mistakes. Not particular as to the means it employed, it successfully utilized a papist plot, which Titus Oates and his accessories took the trouble to detect, as a means of agitation. But the perjured witnesses were followed by a number of perjured counter-witnesses; this trumped-up means was no longer believed in, and in consequence the party lost credit in the larger circles. The daring plan of their leader, Shaftesbury, to exclude the Duke of York from the succession, and in his stead to place the vain, weak-minded bastard, Monmouth, upon the throne, was too Quixotic. By this device all those adherents, who regarded Mary (the wife of the Stadtholder of the Netherlands, afterwards William III.), as entitled eventually to succeed to the throne, felt themselves with reason aggrieved. Besides, the succession of James, who, being only a few years younger than Charles II., was as likely as not to predecease him, seemed at that time quite hypothetical. The immoderate agitation for the Bill of Exclusion accordingly could not fail to arouse the just mistrust of all, who now, after their experiences of the republic, cleaved to the hereditary monarchy with redoubled zeal. By these mistakes the opposition had, in 1681, brought about that reaction, which rendered the first systematically Tory party government in England possible, and which now directed its attacks openly against the strongholds of the opposition in the municipal constitutions.

elected under the influence of the new charters of corporation, declared any bill in Parliament for changing the succession, to be high treason, and after the suppression of the Monmouth insurrection voted £700,000 for a standing army. The loyalty of the landed gentry, the submission of the intimidated municipal corporations, a standing army with a submissive corps of officers (for the most part Irish and English Catholics), an unconscientious and servile bench of judges, the high church clergy with their article of faith of *non-resistance*, and the disunion of Protestant sects among themselves,—all these disclosed a prospect which was decidedly not unfavourable. But, all the same, the campaign against the municipal corporations, the intimidation and the systematic appointment of "well-affected" persons to the civic offices still continued. The triumph which James celebrated over the ill-advised insurrection of Monmouth, brought his personal plan all the sooner to maturity—the plan of rewarding the attachment of his people by the overthrow of the constitution.

The events under Charles I. had proved indisputably that England did not tolerate spiritual and temporal absolutism at one and the same time. But James was of the opinion that so soon as the authority of the Catholic Church should have been restored, a new generation could be educated by Church and school to bring back the people to unconditional obedience to the temporal head-shepherd. "I would rather have the papacy, because it has so much power over men's minds, if only the Pope did not also demand power over kings," had once been the opinion of James I. His grandson conceived that he could divide the absolutism by restoring to the Pope the spiritual half. Hitherto their court theology had supplied to the Stuarts the place of the Jesuit father-confessors, who had, by their absolute ignorance of the rights of nations, brought the dynasties of the Continent to destruction. James II. thought, after the manner of converts, that he ought to drink of the pure waters of Jesuit counsel and advice. He had certainly solemnly sworn to uphold the con-

stitution of Church and State and the rights of the clergy, but his Jesuistic morality whispered to him that these privileges, which had been sworn to, were the very same that Edward the Confessor had accorded, and "no one would doubt that Edward was a Catholic."

In the meanwhile the line of attack upon the constitution of the country by the legislation under Charles I. and II. was not only materially narrowed, but the object of the attack had become an essentially different one. The Anglican Church had issued from the struggle against papists and levellers strengthened in its nature; it had now become bound up with the feelings of the dominant class and of the nation, as being a Christianity that harmonized with the common sense of the people; it had made peace with Parliament, and had become the standard of the royalist party, both in and by the Restoration, and moreover, it was strengthened at all points by constitutional laws. In another direction, owing to the development of self-government and the rights of Parliament, the dominant class had become much more powerful and capable of resistance; the whole of the legal armed forces of the country and their equipment had been placed in the hands of the dominant class, with which a hired army could not compete, in consequence of its want of a fit corps of officers.***

The opening, which James thought he had nevertheless found for the realization of his plans, lay in the ecclesiastical supremacy and in the royal dispensing power. The last-named prerogative was regarded as an undisputed right of pardon in criminal offences, and its extent beyond this was,

*** Cf. concerning the new militia, as being the army of the propertied classes in town and county, the description given above, p. 278, note. Charles II. had planned the formation of a rival force of hired troops, the so-called guards, but these, in consequence of his constant pecuniary embarrassment, could not attain any importance. The troops which were hastily got together by James II. (the so-called "blackguards" in popular language), under papal officers, found themselves completely isolated amidst a population that was in no wise defenceless. In many counties the militia could actually be still mobilized; all the arsenals were in the possession of the landed gentry. Any attempt at a struggle would scarcely have left the "blackguards" the possibility of a retreat like that of Xenophon.

according to old precedents, uncertain; but it was most doubtful of all in the province of ecclesiastical legislation, in which the intervention of Parliament was of recent date and only exercised amid violent struggles. The limits of the constitution appeared to afford him here scope for action. Though no minister and no judge could be found who dared assert that a positive legislative power to alter the common law and the temporal statutes resided in the King, yet there were still to be found both councillors and judges who decided in favour of a negative prerogative, by which the whole ecclesiastical legislation, and with it the constitution of the Anglican Church, might be dispensed away at will. James thought he had gained the requisite power for "dragonades" in his standing army, with its Catholic officers; the means of keeping up this army having been voted by Parliament itself, after the suppression of the insurrection of the Duke of Monmouth. By means of an illegal ecclesiastical commission, with Lord Jeffreys at its head, the King thought to gain a disciplinary power sufficient for Catholicizing the national church. Everywhere we meet the Catholic system; monasticism and the ecclesiastical garb begin once more to peer forth. At last, by ordinance under the name of a "declaration of the liberty of conscience," the Established Church is abolished.

Well arranged as these measures might be according to the Jesuit doctrine, yet, when measured by the substructure of the English constitution, and by the legal and dominant position of the estates and Church in England, their utter perversity and futility becomes apparent. The established clergy, in their ecclesiastical and political position of influence, the old gentry in their attachment to the "Church of England" and to the militia system, the towns with their Puritanical reminiscences, and the whole nation in its jealous pride in its national church, were all mortally offended. The first symptoms of resistance in the very party of *non-resistance*, the opposition of the bishops, ought to have warned the King in time. But James, inflexible, a fanatic in his

belief in the infallibility of Jesuit counsels, a pessimist in his estimate of men, hard and obstinate even to fatuity, persistently follows his aim.†

The consequence, apart from the dramatic details, was the coalition of both the great parties, of those who held the theory of resistance and of the non-resistants, into an actual armed resistance; the summoning of the Prince of Orange; the flight of the monarch, whom all forsook; the summoning of the "Convention Parliament;" the transfer of the crown (which had now been declared "vacant") to the Prince of

† Absolutism was before all incompatible with the Established Church. James II. offended, in the first place, the Established Church party by the re-establishment of a Court of High Commission, against the plainly expressed rules of law. Just as unequivocally directed against the Tories was the suspension of the county militia, and the systematic disarming of the propertied classes. Sixteen lord-lieutenants were dismissed from office, and twelve of these places, as well as one-third of the sheriffs' offices, were filled by Catholics. But the suppression of ecclesiastical legislation by a so-called right of dispensation was a crushing blow, invalidating the enforcement of all laws which had been passed for the establishment of the Anglican Church, declaring all contraventions of them unpunishable, and the oath of supremacy and the provisions of the Test Acts touching the appointment to public offices no longer requisite. Already under Charles II. an attempt had been made to issue a *declaration of indulgence*, which was intended to work in the spirit of restoration, in favour of the Catholics, and not in favour of the Protestant sects. But that declaration, with the usual caution of that reign, had been kept within the forms of a royal right of pardon, and was recalled at the first serious remonstrance of Parliament. The declaration of James II., on the other hand, appeared as a direct abolition of the ecclesiastical laws, by virtue of royal supreme power, and this offensive expression was actually employed in the declaration which was issued for Scotland. The declaration of James II. was based upon the Jesuit maxim, which at all times appeals to the principles and laws of civil "liberty," and even asserts the most advanced principles of "popular sovereignty" against governments and national laws, in order to remove all the barriers of ecclesiastical power, in order, after the removal of these barriers, to rule with all the coercive means at its disposal. The Anglican clergy was enlightened as to the meaning of the declaration, after its experiences of the papal clause "*non obstante*." The legal profession was not, indeed, as yet quite clear as to the exact boundaries between the acknowledged right of pardon residing in the Crown, and a systematic invalidation of the legislation of the land by royal supreme power. But the demonstrative appearance of the Catholic monastic costumes in all public places made the significance of the question patent to all. The union of the two great parties was a necessary consequence. It was certainly a marvellous fate, which forced the most zealous preachers of passive obedience to furnish the first example of disobedience. The seven bishops who petitioned against the declaration were arraigned for sedition, but acquitted by the jury, and among the clamorous rejoicings of the people on account of this acquittal, which even carried away with it the "blackguards," the open insurrection breaks out; the flight of the King, and the further steps of a change in the succession follow each other rapidly.

Orange; and the formal arrangement as a compact between the Prince and the Parliament, by which all previous encroachments of the prerogative made up to that time were declared to be illegal.

To the present day a feeling of the legality of this act, called by the name of "the glorious revolution," still lives in the consciousness of the nation. "Nothing," says Hallam, "was done by the multitude; no new men, either soldiers or demagogues, had their talents brought forward by this rapid and pacific revolution: it cost no blood, it violated no right, it was hardly to be traced in the course of justice." In short it was an event which "united the independent character of a national act with the regularity and the coercion of anarchy which belong to a military invasion."

The "gloriousness" of this revolution is not to be sought so much in the martial deeds of the men who brought it about as in the political wisdom and prudence of the parties which united together to form it. As in olden times at the period of Magna Charta the two great parties of the Middle Ages, prelates and barons, united together in harmonious cooperation, as in the Restoration of 1660 the Presbyterian party had been obliged to help the Royalists, so the Tories in 1688 were obliged to aid the Whigs in expelling the Stuarts. This revolution was not founded upon any party programme, but upon the recognition of common rules and conditions, within the limits of which both parties for the future will move. The ground upon which the two opposite political ideals now met in harmony was the demand for a government of State and Church according to the laws of the land. Upon this common ground both parties succeeded in formulating a code of principles, according to which the government of the country was for the future to be undeviatingly carried on. This code was drawn up in the following thirteen clauses of the "Declaration of Rights:"—

1. That the pretended power of suspending laws, and the execution of laws by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority as it had been assumed and exercised of late, is illegal.

3. That the commission for creating the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of the like nature, are illegal and pernicious.

4. That levying of money for or to the use of the Crown, by pretence of prerogative without grant of Parliament, for longer time or in any other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and that all commitments or prosecutions for such petitions are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is illegal.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That elections of members of Parliament ought to be free.

9. That the freedom of speech or debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That juries ought to be duly impanelled and returned, and that jurors which pass upon men in trial for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeiture of particular persons, before conviction, are illegal and void.

13. And that, for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.

These were in the main exactly the points in which the royal rights of Government had in the last decade been

successively abused, as was set out point by point in the preamble.††

These articles presuppose and once more set forth in a declaratory form the national foundation of the English State, as it had been built up from Norman times, and as it, since the Reformation, had subordinated and incorporated the Church. They treat of:—

The Crown as the source of all powers;

The legal tribunals as a limitation;

Legislation as the supreme regulator of the government.

All political powers proceed from the Crown, and remain centred in the Crown (*tout fuit in luy et vient de lui al commencement*), but they are moderated by the limits imposed by the Crown itself, which bind the King for *the past* to the common law, as established by usage, to his own laws, and to the laws of his predecessors; and for *the future* bind him by the necessity of the consent of the two Houses of Parliament to every change and to every deviation from the law thus established. This was a laying down of the principles of government, as yet unattempted in the history of nations, and which left to generations to come the problem (below, Chap.

†† The Declaration of Rights concludes with these categorical words, which express the character of constitutional principles, "and they do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties; and no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example." The rules thus formulated, which, as a code of fundamental rights, or as a declaration of human rights in general, would certainly be very deficient, are significant when read in connection with the customary principles and laws as to the exercise of royal sovereign rights. They relate to the points that have to some extent been left undecided in the military power (6 and 7), judicial power (3, 10, 11, 12), police power (5, 10), financial power (4, 12), and ecclesiastical power (1, 2, 3) of the King. They were laid before the Prince of Orange in the manner of a treaty to be signed as a preliminary to his election, and it was only after they had been accepted by both Houses under the name of the "Declaration of Rights," had been read, acknowledged, and accepted by the Prince, that the proclamation of the new monarchy was made on the 13th of February, 1689. In the Act of Parliament incorporating the Declaration, a modification was proposed respecting the illegality of the dispensing power of the Crown. In the same session a new statute was to be passed, regulating the limits of a permissible exercise of such a power. This statute was, however, never passed. With regard to the change of succession, the parties united in framing a formula which represents James the Second's action as an abdication of the throne.

liii.) to solve, whether a political government under such conditions was capable, at any given time, of satisfying the real needs of the State and of society.

In the struggles of the century, in all the infinitely complicated phases of the conflict, the internal contrasts of the political system of the nation have successively in all their varied stages been presented to the eye, in a manner that appeals to the understanding and the mind in their very inmost core. In this conflict, the events of the Middle Ages, both in Church and State, are once more revived as an inexhaustible material of controversies for both sides. The same treatment was applied to the doctrines of revealed religion. For the intellectual life of the nation the period is one of a gigantic advance towards self-consciousness as to political topics and things of general human welfare. But what characterizes these party struggles is their immediate practical bearing upon the State and its administration. The appreciation of that which is essential, which was possessed by the nobles at the time of Magna Charta, returns in the present generation on a higher scale. In Cavaliers and Puritans, in Hobbes and in Locke, are reflected the practical experiences of the actual State. The training exercised by local government with its common centre in Parliament gives the different parties the power of comprehending the State under all conditions, and an effectual influence upon the State. The habit of communal life and its purifying moral power, from the lowest strata in the State upwards, casts off once more that corruption which the court of the Stuarts had propagated. In marvellous contrast to the later revolutions on the Continent, in which enthusiasm for the idea of liberty engenders violence and subjection, in England the era of the wickedest royal family, of the most corrupt court, and at times of the most corrupt Parliament, becomes the era of great laws, which form the foundation of the political and moral liberty of the people. The struggles which have been carried on within this constitution, between the great factors of political life, will remain for all future times fruitful precedents, which

European society has won; a lasting and durable gain for the recognition of the first principles of political liberty. At the close of the period certain unassuming alterations in the factors of the executive power are seen; otherwise, a century of revolutions and restorations has passed by, without apparently leaving any traces in the permanent bases of the State, in local institutions, and in the mutual relations of the estates of the realm.

CHAPTER XLIII.

The Conditions of Society at the End of the Seventeenth Century.

With the period of the Tudors and Stuarts another era of six generations has come to a close; a period of time, which in the Middle Ages almost exactly marks the epochs, in which the great revolutionary changes of society in the European civilized world are accomplished. Under reformation and revolution, the organization of society into Estates has again proceeded on an undisturbed, unvarying course, that must be once again examined in this place, seeing that it is the fundamental basis of the now fully developed parliamentary government of the eighteenth century.

The multifarious transformations of the communal system, the more lively activity of the upper and middle classes in the parish as well as in the district, in conjunction with the flourishing condition of agriculture and the rise of commerce and trade, have brought about an upward movement of classes, for which the breaking up of the power of the great martial barons had made room. In the gradations of society at the close of this period it must be understood, that the middle class of the earlier constitutional period now takes its place as "gentry" beside the lords, and the former enfranchised "third estate" now takes the place of the middle classes—each class having in a certain sense advanced one degree higher.

I. *Lords and gentry* have, in this period, gradually come so

close to each other, that the hereditary peers of the realm no longer stand alone as a separate ruling class, but have become an hereditary nobility within a much more numerous dominant class, which is fairly distinguishable under the designation "gentry" given to it in legal language, as in that of the herald's office and of everyday life.

The influences of property have in the first place at the commencement of the period become in a great measure changed, owing to the fact that the old honours of the princely peers, which were confiscated under Edward IV., were not regranted in the old fashion, but in parcels and with diminished revenues; and that, in another direction, hereditary peerages were more and more granted to landowners, whose lands, whether acquired by descent or by regrant, especially from former monasterial estates, were very different from the old "baronies," which were ordinarily continued, in the Exchequer, under the name of "honours." In these estates there was no longer any connection with a neighbourhood in which gentlemen and tenants were wont to regard themselves as retainers of an old "worshipful lord." They were estates like many others of the freeholding knighthood. In consequence of the development of the times, which was seldom disturbed by external wars, and in consequence of the lively intercourse with the towns, which were now rapidly becoming wealthy, the revenues from the lands of the landed proprietors, who came next after the nobles, had increased to a considerable extent. When in 1640 the Long Parliament was convened, the income of the members of the Lower House was computed at £400,000, and their estates at three times the extent of those of the lords. The estates of the lords spiritual in Parliament appear to be considerably diminished, in consequence of the secularizations; and the few newly created bishoprics were not endowed with the old rich landed possessions.

But, together with the relations of property, the legal position of the nobility in the county and local unions had become altered. The former importance of the barons as

personal lords of a martial retinue had long since ceased. All the duties of the landed estates, formerly discharged in the public interest, together with their influence, now falls upon the militia and police administration. The high honorary offices now occupy the position that the *seigneurs* of the Middle Ages had filled. Their influential participation in State functions now lies in the first place in the commissions of peace, which for the most part are filled by the same individuals as compose the staff of the militia organization. The habitual form of these commissions was accordingly certain in the long run to determine the legal conceptions of rank, as the feudal militia system had formerly done. But the commission of peace included, as its chief constituents, the great landed proprietors of the county; the appointments to it, in fact, passed almost as certainly from father to the first-born son, as did the landed estates. At the head of the commission stood regularly, as *custos rotulorum* (who was at the same time ordinarily made lord-lieutenant of the militia), a temporal lord of Parliament. The number of lords was maintained under the Tudors in a certain proportion to the number of the counties, so that a seat in the Upper House and a commission at the head of the county administration generally went together. But in the last-named capacity the hereditary noble and counsellor of the Crown only appeared as *primus inter pares*, with similar official duties and rights. In spite of all deference to "my lord," this was a very different position to that when the great baron held his court with his retinue. The idea of a mere precedence takes the place of the old idea of subordination and personal fealty.

In the period of the Stuarts this new view finds expression in the considerable number of elevations to the peerage. (1)

(1) As to the newly created peerages and elevations under the Tudors, cf. above, p. 144. In the time of the Stuarts this number increased to 98 under James I., to 130 under Charles I., to 137 under Charles II., and to 11 under James II.; altogether 376 under the Stuarts, as against 146 in the days of the Tudors. The reigns of the Tudor dynasty brought about on the average one change in the peerage in every year, that of the Stuarts three. James I. created 62 new peers, Charles I. 59, Charles II. 64, James II. 8; altogether 193. (In the following century, from 1700–1800, there were created 36 dukes,

In the period of the Tudors the total number of peerages had been raised to the maximum of 59. But James I. went so far as to make 62 new creations, Charles I. 59, Charles II. 64, and James II. 8, altogether 193, which, after deducting 99 extinct peerages, gave a total of about 150 temporal peers. Their number was in itself sufficient to determine the new view which began to regard the peerage as an hereditary *precedence* among the gentry granted by patent, and not as a dominant class *per se*. The Restoration completes this political position, and that, too, contemporaneously with the total abolition of feudal tenures by 12 Charles II. c. 24. With the conversion of feudal estates into socage, the full powers of devise over landed estates return. Already by 32 Henry VIII. c. 1, and 34 Henry VIII. c. 5, the landowner had been empowered to dispose by will and testament of two-thirds of his lands held in knight's tenure, and of all his lands held in free socage. By the conversion of all knights' fees into free and common socage, the latter became now the general mode of tenure. (1[a]) There still were to be found at the head

29 marquises, 109 earls, 85 viscounts, and 248 barons.) At the commencement of the Long Parliament it was computed (Rushworth, ii. 1156) that about two-thirds of the earls and barons who had been summoned had only been created within the last generation. James I., as has been already mentioned, for a time offered the dignities of a baron, a viscount, and an earl for sale, for £10,000, £15,000, and £20,000 respectively, which offer was taken advantage of in a single year by four earls (Franklyn's Annals, p. 33). With their unkingly method of government, the frivolous distribution of the highest dignities in the State also increased under his successors. It is true that besides the English gentry many Scotch peers were also received among the number of the English lords; but the Scotch peerage, too, was also enriched under James I. and Charles I. and II. by 214 new creations—more than are met with in the whole Scotch history from Malcolm III. downwards. That Charles I. when in dire need, in 1640, once more summoned the peerage to him in the form of a *Magnum Consilium*, was only an anachronism. The Houses of Lords and Commons had long since become combined into one great body, and could, in the present constitution of the State, be no more parted than could office and tax. After the events of the last hundred years the lords had lost not merely the influence of their possessions, but also so much moral respect, that they could not possibly now, together with the royal cabinet, form a special and separate constitutional body. They accordingly declared themselves to be incompetent. On that very account the lords form no longer a factor in the civil wars, but are divided like the gentry between two camps and two Parliaments.

(1[a]) In harmony with this living form of the estates the feudal *nexus* was abolished as a completely antiquated institution. James I. and Charles I. had negotiated with Parliament on the subject. The Long Parliament had

of the peerage some few families with truly princely possessions, and boasting royal blood; but in the main the English nobility had already become an "elevated gentry."

But this gentry extends in every generation with the landed possessions and with the public offices, upon which it is based. Its marrow was at the close of the Middle Ages the freeholding knighthood, whose estates, in spite of their liability to alienation, could be preserved fairly intact by the law of primogeniture and entail. On the other hand, under Henry VIII., the law as to the liberty of devise by will, and in the seventeenth century the civil war, had led to multifarious changes of ownership, in consequence of which the rich municipal classes enter into possession in great numbers. The new owners pass through the commission of the peace and Parliament, at first politically, and then, after a certain time, socially also, completely into the ranks of the old gentry. But as commissions of the peace and Parliament also include municipal dignitaries, it came about that these were in ever greater numbers admitted into the ranks of the gentry. The honorary designation of *esquire*, which at the close of the Middle Ages was only granted in isolated cases, broadens out and includes the rich civic class of liberal education and occupation, almost within the same limits within which these classes were wont to seek and find admission into the commissions of the peace. As a matter of course the old beneficed clergy kept their old honorary rank, combined with numerous appointments to the commissions of the peace, and to these were added also the higher class of lawyers (the *quorum* of the commissions of the peace), physicians who had studied, and the higher civil and military officials. With almost

(Feb. 24th, 1645) directly abolished all feudal burdens, and the Restoration found in this one of the few points which could be accepted from the revolution without any reservation. The statute abolishing this *nexus* (12 Car. II. c. 24) has as truly radical a form as a statute for the abolition of feudal tenures can well have. All feudal tenures are for the future expressly declared to be held upon "free and common socage," and merge with the urban freeholds into an indistinguishable mass of freehold. It was also declared that "all future grants of land by the King should be in free and common socage."

excessive liberality, the somewhat lower predicate *gentleman* was given in ordinary life. (1[b])

Thus, both in State and society a first class of considerable extent has become formed, partly with personal and partly with higher hereditary designations of honour. Within the highest degrees of the peerage there extends a higher rank down to grandchildren; within the lower degrees, and among those eligible as knights of the shire, to the sons. It is not the family with all its descendants, but only the owners of the family estates, and the vocation to public activity involved therein, who receive the legal or customary title. Pecuniary embarrassment caused James I. to increase these honours by the hereditary dignity of a baronet, which, differing from the general English rule, is a mere title with no public duties attached to it. Under the Stuarts this dignity was granted successively to nine hundred persons, and became a kind of middle degree connecting the peerage with the

(1[b]) The equality in rank accorded the dignitaries of the towns with the titles of esquires and gentlemen dates principally from the days of Henry VIII. This was the time in which the word *gentleman* began to be used almost in the modern sense "which distinguishes the gentleman legally from the noble, and morally from the uneducated plebeian" (Mackintosh, Hist. i. 269). The inclusion of the citizen worthies still slowly increases. The rich citizen, the banker and merchant, the alderman of the larger cities was reckoned to this class almost without question. The commission of peace for the county and the towns was a general standard for the "*rathsfähige*" classes, as they have been called in German cities. Large estates, education, and customary service in the magisterial offices are here, as among the landed gentry, the distinguishing feature. For this reason the retail tradesman, the dealer, and the artisan were not reckoned among such, even when they actually surpassed in wealth many a country noble. Habitual activity in an honorary position in the militia, in the court (commission of peace), and in the Church (by learning) forms the common bond of the gentry, within which, however, the pretensions of old birth, great estates, and high office by hereditary dignities, titles and precedence make themselves felt. In this spirit, from the time of Henry VIII., there arose by law, by the practice of the courts and the herald's office, a very comprehensive table of precedence, which is closed by the general headings esquires and gentlemen, within which rank a very numerous body of persons is conspicuous by birth, dignity, and office as a more distinguished class (Gneist, "Adel und Ritterschaft," pp. 47–50). Gradations which now appear to us pedantic have in their day served to satisfy the pretensions of the older distinguished classes so far as they were content with the moderate right of precedence, and did not aspire to be made a separate caste. The narrower definition of gentry in the books on heraldry, and which is different from that given in the law books, certainly brings precedence by birth much more prominently into the foreground. But these books have never had any influence upon political life.

wider circle of gentry. (1e) At the close of the period the average income of a peer was usually assessed at about £3000, that of a baronet at £900, and that of a member of the Lower House at £800.

II. *The enfranchised freeholders* of the counties and the *enfranchised citizens of the towns* now appear, after the gentry has been thus raised, as politically entitled to be called the middle class. The old line of demarcation, according to which the classes which habitually discharge the duties of jurors, that is, the forty-shilling freeholders, also help to form the enfranchised body, has been retained unchanged in the county. There is added, moreover, to these the service of constables, churchwardens, and overseers of the poor and of highways, which do not fall under the same qualification, but as a matter of fact, ordinarily keep within the same classes. There are added, moreover, the poor rates, which have now become considerable, and the highway and bridge-building burdens, to which these classes contribute large amounts. Almost the same relation exists in the militia service. If, with regard to these, the franchise had been lowered, it would, on the other hand, have been necessary to raise it again; for by stat. 27 Elizabeth, c. 6, the qualification for jurors had been doubled. On the whole, the rate of forty shillings, however, still answered to the average calcu-

(1e) The hereditary title of baronet was intended to a certain extent to take the place of that of banneret, which was for the last time granted at the battle of Edgehill, 1642. According to the original statutes, the new dignity was as a rule purchasable for £1095, but regard was to be had to good family, to the descent from persons who bear arms from their grandfather on the father's side, and who have an annual income of £1000, which was specified more in detail. As, however, it was not very easy to find purchasers for all the 200 patents proposed, these conditions were not strictly adhered to, which, as being limitations of the prerogative, did not bind the successor. The first baronet, created in 1611, was Sir Nicholas Bacon, and then this dignity was, under James I., conferred upon 200 persons, under Charles I. upon 253, under Charles II. upon 426, and under James II. upon 20. The total number of creations down to the present day amounts to more than 1700, of whom about 750 are still in existence, to whom must be added a small number of Scotch and Irish baronets, whose special creation ceased with the Union. The richest old knightly families passed for the most part into the peerage and into this baronetcy; yet there are also still a great number of old freeholding families, who only indicate their descent by their coat of arms.

lation of personal service. There was, accordingly, no inclination evinced to alter the old valuations in any way. (2)

On the other hand, the division in the boroughs was very doubtful. In these the restriction of an active participation in their government reacted continuously upon the suffrage, so that in the majority of cases only the select bodies, capital burgesses, etc., took part in the elections, and the old rule that the right to vote resided in all those who paid scot and bore lot, became actually the exception. Indifference, a result of being no longer accustomed to personal service, want of all statistics for examining into the state of things, and tacitly, also, a feeling that such a restriction was neither illegal nor inequitable, all worked together here. "Incorporation" had become the legal form for this exclusion, which

(2) The enfranchised middle classes have in the course of the seventeenth century attained to political consciousness and to an influential significance, which they did not enjoy either in the preceding or in the subsequent period. The statistics as to the numbers and prosperity of the yeomanry at the time of the civil wars are confirmed by their money payments in the civil wars, and by the great influence of the middle classes at elections. The house of the English yeoman was rough enough, and down to Elizabeth's time had not even a chimney; but the good food and the comfortable appearance of the middle and lower classes has been frequently and credibly testified to. Henry the Eighth's merits have been recently perhaps too highly estimated in Froude's enthusiastic description, and the guild and labour protection system somewhat idealized. But the raising of the economic independence of the middle classes within the agricultural regulations then existing has scarcely been over-estimated. Certain social political laws also of Elizabeth's disclose a direct intention to advance the maintenance of a land-owning middle class by parcelling of estates. In the following period I shall again refer to entails, which were of a contrary tendency. A change was moreover introduced in the social customs of this time, which more and more prevented the means of the aristocracy from being spent in hospitality to their neighbours, followers, and servants, diverted their expenditure into other channels, and thus diminished the immediate influence of the great landowners as well as of the higher clergy upon the middle classes. The old oath of fealty to a mesne lord became under these conditions of things a pure formality. The classes which formerly in great numbers belonged to the great manorial households as idle servants, now found as tenants, tradesmen, and mechanics a more burdensome, though a more independent existence. The novelty of their position and the want of a fixed limit to the middle classes is moreover seen in the deficiency of all proper designations of class and rank. The name *yeoman* for the country freeholder almost takes the place of the *probus et legalis homo* of the Middle Ages. The designation *mystery*, *magisterium*, and the word "mister" (master) derived from it, were widely employed as names for the respectable tradesman and commercial man even in legal documents (Coke, "Inst.," ii. p. 668). In the tables of precedence the whole middle class is taken together under the name of yeomen.

was, on being granted, either expressly restricted to a narrow circle, or was understood to have been so granted. This conception so predominated in the practice of the courts, in jurisprudence and in the election decisions of the Lower House since James I., that we must perceive in it not merely a chain of abuses, but a tacit equalization of the anomalously large representation by an equally anomalous restriction of the enfranchised classes. Even James the Second's brutal treatment of the municipal constitutions cannot in this respect be particularly blamed. At the eleventh hour James issued, on the 17th of October, 1688, an ordinance for reinstating the corporations, annulling the act of disfranchisement and renewing the ancient charters. The majority of the towns took advantage of it, yet only returned to a sort of degenerate existence, in which no serious reform was thought of. After the parliamentary suffrage in the boroughs had become interwoven with the influence of a ruling class and its various parties, a reform proceeding from Parliament could no longer be expected. Like the castles of the Middle Ages, the boroughs now became fortified strongholds for the political influence of the Whig and Tory nobility, and for a smaller part of a municipal patrician clique. The Convention Parliament expressly confirmed all the abuses of the select bodies; the most zealous Whigs soon showed themselves the most zealous representatives of the deformities in the right of corporations, and no sincere attempt to restore a regular municipal franchise was again made for a century to come. As a final result the gentry secured by this means a paramount influence, as was in truth due to them of right for their exertions in the county and parochial unions. In spite of glaring anomalies in individual cases, there was on the whole in the distribution of the franchise a *jus æquum*, although a hard problem was left for a future generation, in which that equalization no more existed. (2ª)

(2ª) The relations of the municipal constitutions and the municipal franchise to Parliament had at the close of this period become so complicated that for a more detailed description I must refer the reader to Gneist, "Geschichte

The class of electors thus limited is, from an economic point of view, a rising one. The number of freeholders has without doubt increased, owing to the passing of huge monastic properties into private hands, to the divisibility of landed estates, and the freedom of devise since Henry VIII. Still more have the progress of agriculture and the market found for produce in towns that have now become wealthy, increased the revenue even of the smaller freeholders. The later calculation, that there existed in the seventeenth century 160,000 freeholders, with an average income of £60 to £70, is, like all statistics of these times, probably exaggerated; but, making all allowance for great differences in different counties, the existence of a numerous and well-to-do class of free farmers at this time is beyond all question. A prosperous middle class was also to be found in the cities, in consequence of a fairly uniform rise in commerce, navigation, and trade. Excepting some unfavourable times and the decay of certain branches of industry, both wealth and prosperity steadily increased in the seventeenth century in spite of the civil wars. This economic position, allied with the consciousness of political influence, with an energetic activity in the parish, and with the progressive development of ecclesiastical reform, made the middle classes the depositaries of independent thought and the mainspring of the opposition to the dynastic hierarchy of the Stuarts; for which reason also the Restoration attacked religious dissent and political heterodoxy among the civic middle classes, without essentially checking their material development.

III. *The unfranchised classes in town and country* form, it is true, a personally free class, and one on an equality with the classes socially above them, both in respect of rights of family and property, but one which has no active share in expressing the will of the State. Both socially, and also in respect of their private rights, this class appears to have become to a certain extent raised.

des Self-Government," pp. 318, 325, and to the survey in Gneist, "Self-Government" (3rd edit., 1871), sec. 100.

The position of the petty freeholders, who were excluded from the franchise, was involuntarily changed by the rapid depreciation of the coinage and the value of money, especially since Henry VIII. While the shilling had fallen to one-third of its former value, and the money produce of land had steadily risen, a number of small freeholders were constantly rising into the class entitled to exercise the franchise.

The copyholders, from being tenant-farmers, have now become partly hereditary possessors, and in part are at least now protected against arbitrary dispossession. Villein tenure only now continues in the form of actual burdens and dues payable on change of possession. The consent of the lord to alienations and the fees payable on change of tenant served the practical end of preserving this kind of real tenure in a more fixed and intact state than freehold. The more persons of higher degree were anxious to acquire such estates, the more did the idea of villeinage become lost in the idea of an inferior tenure.

The status of the propertyless working men was also raised by the growing prosperity, and by the protection of guilds, which the Tudor legislation allowed as an equivalent for its police measures regulating trade and labour.

The legislation of the Tudors also made fatherly provision for the poor working classes, by fixing the prices of provision and wages. Credible statements inform us that a daily pay of $3\frac{1}{2}d.$ was, when compared with the price of provisions, relatively high. (3) The Restoration, too, only exercised a pressure

(3) The unenfranchised, properly speaking, the third estate, was in legal and popular language never so termed, because the styles of estates and ranks were regularly taken from former epochs. But as a fact it has this third position as being formed of a number of *liberi homines* in the old sense, all being equally entitled with regard to private rights. The disappearance of the remains of serfdom in Elizabeth's day is testified to by Sir Thomas Smith de Rep., iii. c. 10. An occasional mention of serfs in judicial decisions under James I. is an antiquarian curiosity. Considering the general conditions of paid labour, the ruling classes had neither any interest in keeping up nor yet any inclination to retain, that isolated fragment of Middle-Age barbarism. As to the conditions of the copyholders, and as to privileged villeinage and pure villeinage, cf. Blackstone, ii. 92 *seq.* The real burdens of copyhold which were akin to the feudal burdens were not abolished by 12 Charles II. c. 24, because they were regarded as private *jura quæsita.* Accordingly the incident fines payable on alienation, taking up the inheritance, the heriots, etc., to the

upon political views, and not upon the social position of the lower classes, particularly in towns. There is especially no tendency apparent to extend the labour-police.

English society, regarded as a whole, forms at the close of this period a pyramid with gradually descending relations of protection and dependence; at the head the peerage, as the apex of a landed gentry on a broad foundation, firmly rooted in the county; this latter again as leader of a still wider class of patrician families; the whole ruling class again with an ascendant influence upon the enfranchised middle classes; the whole population held together upon the basis of equal family and property rights, in which even the institution of entails is quite as accessible for the farmer as for the greatest peer in the realm. That the whole system was conceived of as being a just distribution of civil rights and civil duties is shown by the course of the revolution, in which the most passionate pretension of the rights of the person and the realization of the republican ideal led, not to a lowering but, to a raising of the electoral qualification. The social bases of this political system were so firmly established, that the violent proceedings of Charles I. and James II., the violent deeds of Cromwell and the Puritans, two royalist, one republican, and one aristocratic revolution passed by and left the constitution externally unscathed.

lord of the manor still remains. As to the legislation of the period affecting trade, cf. above, p. 137. How this class was politically regarded in Elizabeth's time, is shown by the testimony of Harrison (1568).

SIXTH PERIOD.

THE PARLIAMENTARY GOVERNMENT OF THE EIGHTEENTH CENTURY.

CHAPTER XLIV.

The Structure of the English State after the Revolution.*

WILLIAM AND MARY, 1689–1695
WILLIAM III., 1695–1702
ANNE, 1702–1714
GEORGE I., 1714–1727
GEORGE II., 1727–1760
GEORGE III., 1760–1820

WITH the Reformation, the Revolution, the Restoration, and the expulsion of the Stuarts, the limits of the executive power

* The authorities of this epoch, which in their voluminousness belong partly to political history, and partly to jurisprudence, allow only a slight selection to be made with reference to the following points:—The statutes of this period form an almost boundless mass of matter, for which the official collection of Statutes of the Realm ends with the death of Anne. The current collections of statutes, however, contain the text complete and correct in all material points. For the Proceedings in Parliament, the "Parliamentary History," vols. v.–xxxvi., extends from the year 1668 to the 12th of August, 1803, with which date this collection stops, and is continued in a new series as (Hansard's) parliamentary debates.

A work upon the history of English Law for this period is wanting. About the middle of the period the first edition (1765) of Blackstone's famous work, "Commentaries on the Laws of England," was published, which down to the close of the century passed through eleven editions. It contains in vol. i. (rights of persons) an admirably written survey of public laws, clearly emphasizing the chief points, which has not been excelled by its later commentators (Stephen, Bowyer, Warren, Kerr, etc.). On the other hand, the historical introductions are merely short sketches. For an exclusive survey of the rich political literature, I may refer my readers to R. von Mohl, "Literatur des Staatswissenschaften," vol. ii. 1856, pp. 3–236.

For local government there appeared in this period a standard work, Burn's "Justice of the Peace" (1st edit., 1755, two small vols., then increasing to four vols. down to the 19th edit., 1800, and now in the 30th edit. in five very compendious vols.—containing more than eight thousand pages).

Of general and political histories the

were in England defined, and the political constitution was formally established. An external change was brought about by the union with Scotland (1706), and with Ireland (1801). Apart from this, the accession of William III., with the Declaration of Rights, marks the commencement of parliamentary government by party, the consideration of which requires a comprehensive survey of the structural fabric of this political system in the eighteenth century.

Like all great free states, the British is based upon a strong and firm construction of the executive. In so far as it is necessary to make the person and the property of the individual serviceable to the State, this State is stronger than the most absolute despot in Europe. Since the Norman days, a feature of military obedience and discipline pervades the English political system, a system which, hitherto unknown to the States of the Continent, has only been efficiently portrayed to them by modern historians.

The *Crown* is at all times the source, the *courts of justice* the barrier, and the *law* the supreme regulator, of these powers. But, throughout the four hundred years of legislation since Edward I., a relation of mutuality has entered into these elements, which circumscribes State and society, State and Church, local government and estates alike with fixed legal barriers. These self-imposed bounds of the Crown work at the same time as legal limitations of Parliament and parties, and as a legal protection of classes, corporations, and individuals. The sanctity and inviolability

following must be specially mentioned: Hallam, "The Constitutional History of England," vol. iii. (down to the death of George II.); Lord Mahon, "History from the Peace of Utrecht," etc., 1836–1854, six vols. (from a Tory point of view); W. Massey, "History of England under George III., vols. i. and ii. 1855 *seq.*; Thomas Erskine May, "Constitutional History since the accession of George III.," vol. i., 1861 (German translation by Oppenheim); Charles Duke Yonge, "The Constitutional History from 1760 to 1860," London, 1882. The very rich matter is in many cases almost too intimately connected with the family and party relations of the present times.

For the statistical and administrative conditions of the eighteenth century, John Adolphus, "The Political State of the British Empire" (London, 1818, *seq.* 4 vols. 8vo), contains much valuable matter; to which much may be added from the writings of McCulloch and other politico-economic works, especially on the history of the poor law system.

of this system was acknowledged by a formal agreement between the two great parties of the nation, on James the Second's abdication; and all party formations, all party movements since that time have been based upon the following conditions.

1. The law recognizes the hereditary Crown as the fundamental institution of the land, and establishes its fixed succession by the Act of Settlement.

2. The law controls the sovereign rights of the State, imposes the requisite duties upon the subjects, and specializes these duties in a manner which prevents arbitrary proceedings against individuals.

3. The law regulates the exercise of magisterial rights by counties, towns, parishes, and corporations, which thus become the fixed depositaries of political functions, according to the peculiar system of English self-government.

4. The law affords for the maintenance of these administrative functions a legal protection, by a comprehensive system of remedies *ex debito justitæ*, the now so-called *administrative jurisdiction.*

5. The law determines also, with the duties of the subjects, the corresponding *rights of the estates*, among which a "ruling class," with an influential share in the executive, makes itself prominent.

6. and 7. The law governs their combination as a representation of the *communitates* in the Lower House, as a spiritual and temporal peerage in the Upper House, each with a suitable share in the exercise of the political powers among themselves and towards the Crown.

8. The law guarantees to the Established Church the self-government necessary for ecclesiastical activity, and thus succeeds in finally reconciling Church and State.

9. Upon these foundations a new relation is formed between the "King in council" and the Parliament, which has become known under the name of Parliamentary Government.

Within this framework ** the parties of the English political system are formed, as well as the practice of parliamentary government and the transition to the reorganization of society in the nineteenth century (Chapters liv.–lviii.).

** There is perhaps no more fruitful and instructive parallel than the comparison of this structure in the eighteenth century with that existing at the close of the fifteenth century (Chapter xxix.).

CHAPTER XLV.

I. The Restoration of the Hereditary Monarchy.

James the Second's deposition threatened to produce a series of struggles and revolutions, such as from the Norman times downward had always attended every breach of the legitimate succession. Only too vividly did the consequences of the execution of Charles I., which had happened only a generation previously, stand before the eyes of the men of those times. To avoid similar consequences, both parties, after long scruples and deliberations, framed the resolution "that King James II., having endeavoured to subvert the constitution of this kingdom, by breaking the original contract between King and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant."

The fact of deposition was veiled by the fiction of a resignation, which in some measure was in accordance with the circumstances under which the King had quitted the country, and by the further fiction that the heir already born, Prince Edward, was illegitimate, an assertion which coincided with a widespread popular opinion, as well as by the addition of further circumstances of the event, which, according to human calculation, could not recur in the same form, so that the danger of forming a precedent was avoided.

In consequence of these fictions, the Crown was held to devolve upon James the Second's eldest daughter, as heiress, who was now recognized, in conjunction with her husband, as

the rightful heir to the throne. Quite as consistent was the devolution of the Crown to her younger sister Anne, failing issue of the union of William and Mary, a contingency that was not anticipated in the year 1688, but which actually happened.*

This was *ex necessitate rei* the closest practical adherence to the traditional descent of the Crown, due regard being paid to the fact that, in consequence of the great shock sustained by the realm, a male ruler appeared indispensable, and that therefore William should be joint sovereign together with his consort, of whom he should even take precedence.

A still further limitation of the succession appeared necessary, according to the experiences of the past. The succession of the Catholic Mary I. had plunged the country into a bloody counter-revolution, the succession of the Catholic James II. had brought about a fresh revolution. The nation was not to be exposed for the third time to the disastrous vicissitudes of a Catholic succession. Accordingly the stat. 1 William and Mary, c. 2, was passed, to the effect that every person, "confessing the popish religion," or who should contract a marriage with a popish consort, should be for ever incapable of succeeding, that the people in such case should be freed from all allegiance, and that the Crown should pass to the next Protestant heir.

When, towards the end of William the Third's reign, a failure of male issue became probable, alike in his case and in that of the Princess Anne, the final Act of Settlement (12 & 13 Will. III. c. 2) was passed, which in case of the failure of Protestant descendants of Charles I., goes back to the electress Sophia of Hanover, the daughter of Princess Elizabeth, who was the daughter of James I., whose agnate Protestant descendants were to succeed to the throne in the event of the deaths of William and Anne.**

* The declaration of the 12th of February, 1688, determines the succession thus: first William and Mary jointly; then the survivor of them; then the issue of Queen Mary; then, failing such issue, the Princess Anne and her issue; failing these, William's issue, as the grandson of Charles I., and nephew and son-in-law of James II.

** Legal construction was obliged

The legal and moral verdict of posterity has with rare accord acknowledged the "glorious revolution" as justifiable. It was no breach of divine and human law when, after the experiences of three generations, the nation emancipated itself from the male line of a dynasty, which had utterly misunderstood and neglected every duty of the Crown and every task imposed by the times. Former centuries had ended the life of more than one English king in a manner that was more akin to a breach of right than was the treatment experienced by this King. If the English nation had for three whole generations borne the misgovernment of such a dynasty, if it at the last veiled over the most frivolous tyranny of James II. with the good-natured fiction of an abdication, the reason for this moderation lay in the mature experience of a people that had arrived at man's estate. It was not the inexperience of a people that has been long unaccustomed to all spontaneous action in public life, such as characterizes the French revolution and its successors, but it was the consciousness of the great shock to all legal and moral foundations, which follows the overthrow of a legitimate monarchy, it was the probability of the consequent swamping of the State by the egoism and the party-system of society, which made the nation endure so much with patience. For the first time, with the clear consciousness of the consequences that would attend a change of dynasty, the English people took the manly resolve to accept the consequences in spite of all.

In truth, the conditions of things that ensued after the change of dynasty, resembled the times immediately following Magna Charta. Discontent had never been greater than it

to resort, for these deviations from the legitimate succession in the male line in favour of daughters, to legal fictions and to a deduction *ex necessitate rei*, to reduce the breach that had been made in the fixed rules of hereditary descent to its lowest possible importance, and to avoid dangerous precedents for the future, so far as human prudence and wisdom could effect this. Blackstone builds up from this proceeding his four positions concerning the royal title: (1) that the Crown is hereditary, (2) hereditary in its own manner (analogous to the descent in real estate), (3) that the right of succession may be from time to time altered or limited by resolution of Parliament; with which restrictions (4) the Crown always will be hereditary, is so and remains so.

now was, when everything appeared won. A factious nobility, with complicated plans of action without any great aims, and capricious changes in the prevailing opinions, fill the whole of the next generation. The Whigs, whose chief strength lay in their majority among the nobility and in the upper classes in the cities, did not cease, in spite of all legal fictions, to regard the King as their own creation; the Tories persisted in considering him only as a sort of regent. The working classes in sullen apathy witnessed the departure of their natural protector, the legitimate monarch; and they received their new lord with the same indifference. Parliament, church, and common law returned to their old places; yet the victorious party regarded this as a natural consequence. No one felt himself socially in a better position; but the Tory party found to its vexation, that only their hated opponents, and with them a foreign prince, had attained to power. This new monarchy, even though an act of political necessity and wisdom, was and remained an artificial thing. The hearts of the people were not with the King, and therefore, perhaps, the King had no hearty feeling for England. William's chief object in life, the struggle against the ascendancy of France, and the maintenance of the independence of Holland, and of the balance of power in Europe, was not in accordance with insular views. The grand struggles of the statesman neither gained for him the approval of the great parties, nor endeared him to the multitude. Parliament had certainly gained all that could be gained in this constitution; the monarchy was now "an expensive but otherwise inoffensive capital to the social column." The result, however, was not an exalted feeling of civil liberty, but constant collisions of the Government with a proud and hot-blooded nobility, a purse-proud middle class, and an intriguing divided clergy.***

*** The riddle of the phenomena which occur after every great rising of a nation (as also after the reformation in Germany) can never be otherwise explained than from the nature of society itself: "After the display of the noblest energies, and after the highest ideal aims have been realized, there comes a weariness, and with it an unfettering of social interests, which by 'Freedom' only understand the immoderate satisfaction of their own interests. After the most glorious result has been gained for the whole

The lesson taught by the glorious revolution, a lesson never to be forgotten by the English people was, that even the most righteous insurrection of society against the constitutional executive is the greatest disaster that can befall a nation. After this glorious revolution, there remained innumerable difficulties to contend with, throughout the whole system in the internal life of the nation which a just, wise, and conscientious monarch would have spared the English people. Even in the second generation there is disclosed to us in the new order of things an open attempt at rebellion. It was not until the third generation that the evil effects of the change of dynasty were really healed.

community, the individual proceeds to strike the balance for his little world —his *ego*—and begins to calculate how much of the glory and fortune of the great whole belong to this *ego*. Vexed at the small balance in his favour, and even finding a deficit in the account of his prosperity, he gives way to the nature of his social character, pays the tribute due to the imperfection of human nature by an attitude which degrades the great relations to the lowest standard, after their exaltation to the highest and holiest" (Gneist, "Preuss. Finanzreform," 1881, p. 247).

CHAPTER XLVI.

II. The Regulation of Sovereign Rights by Law.

In the course of the Middle Ages the Germanic nations display a national tendency to regulate, hand in hand with the hereditary monarchy, the exercise of the royal sovereign rights to the widest extent by fixed principles, which, acting on both sides, bind both King and people. At the close of the Middle Ages, this specialization had made such progress on the Continent, that the development of an administrative legislation may be regarded as the main point of contrast between the modern political system and the Middle Ages, as well as the ancient world. In England, the long struggle against the absolutism of the Norman Crown and the century of Stuart misgovernment brought the specialization of these rules of law to an extreme form, which reached its height in the eighteenth century. This regulation by law embraces all departments of internal political life to the utmost possible limits.

I. *The regulation of the military power of the State by law* is based upon a separation of the armed force into the ordinary military system of the militia, and the extraordinary organization of a standing army.

The militia laws of the eighteenth century are bound up with the system of the Restoration for the acknowledged purpose of keeping the wealthy classes at the head of the armed forces. These statutes repeat in monotonous detail, and, as a rule, literally, the clauses of their predecessors. After evil

experiences as to the small utility of the militia forces, the stat. 30 George II. restricts the number to 30,740. However, in 2 George III. an extension and a reframing was made, and, after many additional provisions, a new consolidation was effected in 26 George III. c. 107, in which form the militia continued down to 1802. In the later statutes, the strength was fixed at 120,000 men, and in like manner the number of supplementary militia was limited. This legislation, however, of course not only determined the personal service of the soldiers, the manner of drawing them, and the grounds of exemption from service, but even the composition of the regiments, battalions, and companies, the organization of the staff and the times of training. But this statute principally regulates the composition of the administrative commissions and the qualification of the officers. By 2 George III. c. 1, and 26 George III. c. 107, the lord-lieutenant appoints in each county twenty or more deputy-lieutenants with a qualification of £200 income from freehold, in the smallest counties £150. He appoints the colonels with a qualification of £1000 income, or double that sum in expectancy. The qualifying income of the lieutenant-colonel is £600; that of a major or captain, £200 (or heir to £400, or younger son of a landowner of £600). A lieutenant must have £50 income and £1000 personalty (or both together £2000, or the son of a deceased landowner of £600). An ensign £20, or personalty valued at £500, etc. There is no stronger contrast to this form of land army than the Prussian *canton-system* of the same period, which casts the whole of the personal service upon the peasant classes and lower classes in the towns, and raises funds for the army expenses by contributions from peasant farmers and the excise of the cities. (1)

(1) The very dubious utility of an army organized according to this system was seen on the occasion of the invasion of the Pretender in 1745. Such experiences and the constant mistrust of a standing army led from time to time to improvements and strengthening of the forces. But after the scare had passed away the old carelessness returned. With the exception of the city militia of London, in the middle of the century reviews and trainings were again neglected, until, in the year 1756, the danger of an invasion led to

In equally strong contrast to the needs and legal relations existing in Continental States is the conception of a standing army in England. The rough military rule of Cromwell, as well as the attempts at overthrowing the constitution made by James II., had left behind them the lasting impression, that every standing army was a source of danger to the constitution and in irreconcilable opposition to the rights of the estates. Yet, as such an army appeared indispensable, considering the colonial possessions and the international position of England, a paid army was after 1688 tolerated under the following conditions:—

1. Under an acknowledgment to be annually repeated, that the existence of a standing army in times of peace is contrary to law.

2. Under the acknowledgment to be also reiterated every year, that this army is not necessary for the maintenance of political order, but only convenient for "upholding the balance of power in Europe."

3. Under the condition that the expenses of this army are to be entirely defrayed by an annual subsidy, and thus dependent upon a free grant of money voted by the Lower House and liable to be refused.

4. Under the condition that the command and disciplinary powers of the Crown necessary for a standing army are as

the resolution to form a less numerous, but more efficient militia. But soon the number was again considerably increased, to 120,000 men. The militia thus organized was and remained unsatisfactory for immediate employment in the field; but it was still so considerable in numbers, and the standing army, compared with it, so small, that materially as well as morally it was thought that the elements were almost evenly balanced. The militia actually again revived in the period of the French wars. In 1793 and 1796 a supplementary militia was introduced to increase the forces. But the inclinations of the upper classes were directed rather towards forming volunteer corps. The first statute on this subject is 34 George III. c. 31. Four years later the stat. 38 George III. c. 51, was passed for the formation of mounted volunteers (yeomanry cavalry). All supplementary militia and volunteer corps still keep up the connection between the armed forces and landed property; the commissions of all the officers are conferred by the lord-lieutenant. In the time of the threatened invasions from France considerable contingents of volunteers were even furnished and equipped by rich landowners at their own expense. The supplementary militia organized in accordance with the statute of 1796 was actually mobilized in the spring of 1798, but those troops served very soon as material for drafting into the standing army, which was with certain restrictions allowed and voted by Parliament.

extraordinary powers to be granted each year by Parliament by a Mutiny Act (beginning with 2 William and Mary, c. 5, sess. 2, c. 14), on the refusal to grant which the army would be *ipso facto* disbanded.

5. Finally, with a condition that was still further developed in the course of the century, that by the system of purchase of the officers' commissions, the whole corps of officers, both of the infantry and cavalry, remains reserved to the sons of the dominant classes.

Under these very anomalous conditions the effective strength of the army in England is dependent upon the resolutions of Parliament, which annually determines how many paid soldiers shall be recruited and kept on foot.

The principal object of this military system, the maintenance of the national independence against foreign attack, is fulfilled for this island power by the navy, which, in strength and activity, in the eighteenth century finally takes the position which the peculiarity of the country demands. In this normal organization of national defence the normal principles of a military system are to some extent again met with, *e.g.* the fixing of the permanent organic institutions by statute (beginning with 2 William and Mary, c. 3); the regulating of technical details by ordinances, royal warrants, and regulations. (1[a])

(1[a]) The English military system, compared with the entirely opposite institutions of the Continent, is based upon three anomalies, which in some measure neutralize each other. (1) The English system of the annually varying strength, the Mutiny Bill, the paid soldiery, and purchase of officers' commissions is applicable to a country which needs its troops for service in distant colonies, and is only inclined at long periods to engage in active warfare within the European family of nations. (2) The militia, which in this form would in any other country be utterly insignificant, still retains in its corps of officers military elements, as the colonies and East Indian possessions afforded the gentry a field for practical military service, in which even great military capacities could be developed. While the state of the country would otherwise easily lead to effeminacy, there was preserved here in the dominant class a military skill, which was also advanced by purchase in the army. (3) The normal conditions of the existence of a system of national defence, which no nation can dispense with entirely, are again found in the navy, even united with a very harsh system of pressed service That it has been thought possible to apply the system of Mutiny Bills to continental States, and that it has been considered to be a pattern "constitutional" institution, belongs certainly to the most absurd imitations of foreign institutions.

II. *The regulation of the judicial power by law* is based upon the fundamental distinction between the *administrative side* of justice (the holding of a court) and the *judicial side*—to use a Roman expression, a distinction between *imperium* and *jurisdictio*.

Only the administrative side belongs to the province of administrative law, and is in England fixed by a few organic arrangements, beside which the Lord Chancellor, the Home Secretary, and the common law courts issue rules and exercise a regulating power, of which considerable use has been made in the nineteenth century.

All that, on the other hand, belongs to jurisdiction, in the proper sense (the principles of private and criminal law, the formation of the courts, and the procedure regulating the rights of the parties) is founded partly still upon custom and the practice of the courts (common law), supplemented by the numerous statutes since Edward I., which, like the common law itself, can only be altered by statute. The judicial system appears also in this epoch to be the most stable part of the constitution. In the higher courts, since William III., the appointment of judges for life is again restored, and is legally sanctioned by the Act of Settlement. The jury system is strengthened by the legal control of the lists of jurors which are now made out by the local officers (7 William III. c. 32; 3 George II. c. 25). The qualification of jurors was by 4 and 5 William and Mary fixed at £10 from freehold or copyhold; by a later statute an annual income of £20 from lands held on a life lease is put on an equality with this qualification. The principle that the courts have only to decide according to law, and that they have of themselves to interpret the rules of law, is common to England and to Germany. (2)

III. *The control of the police power by law* led even in

(2) As to the details of the legal organization of the judicial system, cf. Gneist, "English Verwaltungsrecht," ii. c. 6. As to the further extension of the right of issuing rules in the province of the administration of justice, cf. Gneist, "Verwaltungsjustiz," sec. 6.

the Tudor and Stuart eras to an innumerable series of special police laws affecting security of life and property, trade, morals, luxury, the poor, labour, highways, etc., which in their outward form are very similar to the German imperial and country police regulations. But this broad system becomes more and more extended, as every amendment has to be brought about by parliamentary statutes. Yet this legislation does not suffice, but needs rather to be supplemented in numerous points by reference to the old police functions of the magistrates, the coroners, the constables, and other officers of the peace according to common law, which all were fixed and determined by the practice of the administration. The tendency to restrict as much as possible in this department the discretionary powers of the officials, could only be worked out in part, and even in the most special police laws the introduction of discretionary empowering clauses was unavoidable. The "general clauses" which are indispensable to the German police administration are reproduced in England for the most part in the "powers of the officers of the peace according to common law." Special local police needs are provided for by local acts, and to a limited extent also by by-laws of the county and local boards. In London and in numerous provincial towns, for example, the urgent demands for a police for fires, building, paving, street-cleaning, watering, lighting, watchmen, and embellishing are met by comprehensive local statutes and by-laws.

The influence of the class interests of the ruling gentry upon the police legislation is characteristic of this period. This is more especially shown in the legislation affecting game, which, in most immoderate exaggeration, goes even so far as to inflict death for the most serious poaching offences. And secondly in the poor law legislation, which, in order to alleviate the burden of providing for the poor, which fell upon landed proprietors ever since Charles the Second's day, allowed a division of parishes into small townships and hamlets. The narrow-minded treatment of the right of settlement and the system of removal, which begins

with 13 and 14 Charles II. c. 12, and is continued under James II., is declared to be permanent by 12 Anne, c. 18. The further series of statutes is also pre-eminently occupied with the difficulties of an ever narrower and stricter right of settlement. In a similar spirit by 3 and 4 William and Mary, c. 12, the right of appointing overseers of highways was vested in the magistrates instead of election in the parish union. Moreover, the codified highway regulations of 13 George III. c. 78, retain a mixed system of enforced labour in connection with the highways and of highway rates. Other characteristics of this period are the endeavours to regulate more exactly the judicial functions and procedure of the justices of the peace, to make the decisions of the magistrates in courts of first and second instance as a rule final, and to secure the obedience of the constables and other executive officers by the express threat of disciplinary penalties; by all which the range of the police laws is more and more increased. (3)

IV. *The regulation of the financial power* by law is based still upon the distinction between the King's ordinary and extraordinary revenue (Blackstone, i. c. 8).

The *ordinary revenue* includes the old hereditary income

(3) The range of police laws increased to such a boundless extent that they can only be surveyed in an exposition of the magisterial office as it now exists (cf. Gneist, "Self-Government," chap. v. pp. 189–517, 3rd edit., 1871, and the sections dealing with the police administration in the towns, sec. 107, the pauper police, sec. 119, the police for public health and building, chap. xi., the highway police, sec. 140). The far-reaching extent of these laws stands also in connection with the administrative jurisdiction. The police jurisdiction required very special rules for deciding each particular case, and on the other hand for the practical use of the magistrates, their clerks, and under officials, it was necessary that the laws, which were to be applied in each single case, should be found in as complete and compact a form as possible. The poor law legislation of this period is so artificially framed that it can only be understood in a detailed exposition. The codified highway regulations of the year 1773 still retain the system of manual labour (contributions in kind), yet allow low rates to be paid in acquittance of such labour and services, and raise the expenses by a highway rate. (There is extant a calculation of the year 1814, according to which the value of service in kind is computed at £551,241, the moneys paid in lieu thereof at £287,095, and the highway rate at £621,504.) The necessity for constructing roads, which had begun to make itself felt, was regulated by local acts, by which committees are formed for this purpose, the members being magistrates and interested persons. A general supplementary act for regulating highways was issued in 13 George III. c. 84.

of the King, the original property of the State, which belongs to the King independently of any vote of Parliament. This original property has very considerably decreased in consequence of the great alienations of the demesnes, the abolition of feudal incidents, etc., and now displays merely a shadow of past greatness. Yet if it had been only properly managed it could have sufficed for the royal household. But through careless management, the Crown lands were, under George III., so heavily burdened with debt that this monarch preferred to assign to Parliament by agreement (1 George III. c. 1) the administration of the Crown estates, and to receive in exchange a fixed sum from the State revenues (civil list). This arrangement, which was made only for that king's life, has, on the accession of all his successors, been renewed, though under different conditions, but always only as an arrangement *pro tempore*, which reserves to the Crown at every change of Government the option of taking back the hereditary revenue into its own keeping and management. (May, "Const. History," c. 4.)

By the *extraordinary revenue* is understood the income derived from direct taxation, customs, and excises granted by vote of Parliament. The great and constant needs of the State in the eighteenth century, and the rise of a national debt, no longer allowed the machinery of the English State to be dependent upon periodical votes of subsidies, which the Lower House also no longer needed for the sake of influence. In the course of the eighteenth century, accordingly, all the subsidies that were till then temporary passed into permanent taxes; the taxes and custom dues to be raised after that time were no longer "voted," but were raised for the State coffers by operation of law. It was only on the introduction of the modern income tax and the legal regulation of the new customs tariff, that a movable form was again provided for a moderate portion of the direct taxes and certain articles included in the customs tariff, so that perhaps from one-tenth to one-seventh of the revenue is dependent upon the vote of Parliament. With the regulation of the customs and taxes

by law, the most precise specialization entered also into the financial statutes, which determined the subject, object, mode, and measure of the tax to the very confines of possibility. The influence of the ruling class here shows itself in refusing each and every new assessment, and consequently in the decay of the old land tax, on the other side in an immoderate increase in the excise and customs, the last named in the protective interests of great manufacturers and landowners. (4)

Strict regulation by law is also applied to the system of local rating, in which, by many hundred statutes and by the practice of the courts, subject, object, and method have been exactly laid down, and the local authorities are allowed no autonomy in fixing the rate of taxation, but may merely make a calculation of the annual need and co-operate in assessing the rates and taxes.

V. Lastly, *the ecclesiastical power and supremacy* was limited and controlled by the Acts of Supremacy and Uniformity of Elizabeth, and the supplementary statutes of the Restoration, directed towards upholding the power of the State against possible encroachments of the ecclesiastical authorities, by the statutes of *præmunire*, Mortmain, and other similar statutes. The Act of union with Scotland added a guarantee of the permanence of the constitution of the Anglican Church. (5)

(4) Customs became permanent taxes by 9 Anne c. 6, 1 George I. c. 12, and 3 George I. c. 7; with 27 George III. c. 13, the systematic customs tariff begin. The old subsidies, tithes, and fifteenths were by 4 William and Mary, c. 1, made fixed taxes, in the case of which the contributions arising from personalty were almost entirely waived and the now so-called land tax was levied upon the counties and towns, by 38 George III. c. 60, changed into a permanent tax upon landed property. Into the place of the periodical subsidies came, after 1797, a legally fixed property and income tax, but with a varying scale. A house and window tax was introduced by 7 William III. c. 18, as a permanent tax. In like manner the *assessed taxes* (that is, a group of taxes levied upon provisions, articles of luxury, and trade) were introduced as the financial needs increased, and codified in 48 George III. c. 55. In like manner the special stamp duties (cf. Vocke, "Gesch der Steuern des brit. Reichs." Leipzig, 1866). The alleged "constitutional" principle that the Parliaments had annually to vote all the revenue to the Government has in Germany arisen less from the English pattern than from a confusion of the old periodical subsidies voted by the Landstände with the modern system of taxes regulated by law, which latter is alone admissible and practicable for our modern State organization. The constant mistaking of votes of subsidies for taxes created by statute is an inexhaustible source of confusion.

(5) Cf. Gneist, "Englishe Verw. Recht," ii. c. 8, and below, Chap xlvii.

In spite of the enormous extension of this legislation, the original rival relations subsisting between law and ordinance in administrative law remained fixed and established. The activity of a State can, in spite of all endeavours, never become exhausted in statutes. Society rather, in its varying phases according to time and place, requires an ever fresh activity in ordering or prohibiting on the part of the State. And what the executive has to order in individual cases, it can also, in cases of a similar kind, command or forbid by ordinance. The requirements of civil life remain accordingly an inexhaustible fount of new rights of ordinance. In consequence of the misgovernment of the Stuarts, however, we find in every case where the executive power addresses itself immediately to the person or property of the subjects of the State, the English legislation so extremely specialized, and the department of internal administration so extensively preoccupied and overgrown by legislation, that the field for an independent right of ordaining appears exceedingly limited, so that English jurisprudence made the error of holding that the right of ordinance only existed for the purpose of "executing the law." And thus the blessings of legal regulation and control became a galling fetter, which gave the English administration an unwieldy character, that could only be gradually removed by a more intimate bond of union between ministry and Parliament (Chap. liii.).*

*. That the relation between law and ordinance, as it was established at the close of the Middle Ages (above, p. 22), remained also unchanged in England, has been proved in Gneist, "Verwaltung, Justiz, Rechtsweg" (1869), chap. vi. p. 69 *seq.* Only the administration of justice by the civil and criminal tribunals is exclusively dependent upon the rules laid down by the legislature, whilst in the department of administration, ordinance remains binding for State officials and subjects so far as its province has not been already occupied by a positive administrative law. But this was in England the case to such a wide extent, that the right of ordinance, appears even in Blackstone only as a supplementary function. With regard to the forms, the English ordinances are almost identical with our own. The ordinance appears either in the solemn form of a royal resolution, countersigned by the whole ministry (order in council), or as a cabinet order with the counter-signature of the head of a department (warrant), or as a delegated right of ordinance, most frequently of a secretary of State. In like manner the division into independent ordinances, executive ordinances, and the ordinances reserved by law is in England identical with ours in Germany. The department of district and local police ordinances, on the other hand, is much more restricted than in Germany.

CHAPTER XLVII.

III. The Connection of Sovereign Rights with Local Institutions—The System of Self-government.

As the exercise of sovereign rights must take place according to geographical districts, the State needs executive organs in the greater and smaller unions of the counties, hundreds, towns, parishes, and villages. Since the Anglo-Norman times these functions have in England been taken more and more from the *vicecomites* and bailiffs, to be discharged as far as was possible by the parishes, and, in their further development, principally by individual officers chosen from the resident staff of the communities. The English unions of parishes are, however, not privileged to regulate their own police system, poor-law boards, and rates according to their own will, but they exercise legally limited authoritative rights in their capacity as indirect State officials, and raise and extend their rates according to a legally determined scale, for legally determined objects. English self-government has accordingly formed itself into a system of offices and rates, regulated and determined by law.

If for this system (which even in England has never been legally defined) is used the expression *self-government*, there will still be needed a distinction between *magisterial* self-government, which is pre-eminently meant by the term *self-government*, and *economic* self-government, which has its centre in the system of local taxation and the assessment and employment of that taxation within the respective unions.

I. **Magisterial self-government** is bound up with the high offices, which arose as early as the Middle Ages, the competence of which is regulated partly by common law and partly by statute. The English central government had, until quite recent times, no other organs for provincial, district, and local government than these offices within the several communities. For this reason they all have this characteristic, that being free from every element of manorial jurisdiction or manorial police control, they are regarded as pure official functions, and are subject to the civil and criminal responsibility, the right of control, the right of supervision, the disciplinary control, and the right of dismissal, almost exactly corresponding to the German notion of "*Mittelbare Staatsbeamten*." Of this kind are the following offices:—

1. The ancient office of sheriff, *Vicecomes*, which indeed has lost its important ancient functions in the course of centuries, but which still continues as a subordinate judicial office for summonses, executions, and for carrying out the sentence of the law, with the presidency in the still nominally existing "county court," a right of precedence, and many remnants of an old vice-royalty. The office is annually filled by one of the great landowners of the county.*

2. *The office of the lord-lieutenant*, the modern vice-royalty of the county, is filled by one of the most aristocratic landowners in the county, practically for life, and with powers to appoint the officers of militia and the commissioners of the militia department, who for the most part are also on the staff of magistrates, just as the lord-lieutenant is, as a rule, made first magistrate, *custos rotulorum*.

* In the main the "civil court" of the sheriff has now become an accessory department of the common law courts for summonses, executions, and summoning the jury. For these current official functions he appoints for the period of his year of office as his deputy an under-sheriff, whose lawyer's office is the central bureau, from which are issued the various orders, carried out by the bailiffs of hundreds, but in whose stead bound bailiffs generally discharge the greatest part of the detail business. Thus arises a procedure not unlike that of the French *huissiers*. In like manner the sheriff was responsible for the appointment of the officers of the county prison. The office of sheriff signifies accordingly in the main a right of appointing to a number of lower offices, which are thus withdrawn from the ministerial patronage.

3. *The office of justice of the peace,* dependent upon the royal commission of peace—the life and soul of the district administration, with almost unlimited functions for examining criminal cases—as police magistrates, as court of higher instance for the parish, as district government board, and as a criminal court with a jury in the quarter sessions.

4. *The office of coroner,* whose principal duties are those of a commissioner of inquiry, wherever unusual deaths have occurred, with a jury from the neighbourhood; anomalously not appointed by the King, but elected by all freeholders in the county.

The office of constable is subordinated to these magisterial officers of self-government.** As subordinate officers, though in a more independent position, are to be regarded the churchwardens and overseers of the poor and of highways, who, in their principal functions, belong to the department of economic self-government.

This official system is supplemented by a powerful bond of connection with the people, namely:

The immediate activity of the middle classes as a jury in civil and criminal cases at the assizes and at the quarter sessions;

The grand jury in assizes and quarter sessions;

The participation of the whole people in the duties of prosecuting and giving evidence, which liability is enforced by the justices of the peace against the proper persons, by binding over to appear and prosecute.

Finally, to these are added the activity in the assessment commissions for the land tax, which, since the civil wars, have, both in the persons comprising them, and in their

** The high constable is immediately subordinated to the body of justices of the peace, as bailiff of the district, principally appointed for the execution of such magisterial orders as are addressed to several under-constables. The petty constables still retain their ancient functions as independent *custodes pacis*, with their own right of arrest; but in consequence of the increasing business of the magisterial department they become more and more executive officers for the decrees, orders, and judgments of the several justices of the peace and sessions, in which they regularly appear to make their presentments and reports. After the decay of the court leet they were regularly appointed by the justices of the peace.

procedure, become more and more identified with the office of justice of the peace. The same system is extended to the assessed taxes, as well as to the income tax introduced by Pitt at the close of the century.

The independence of the higher officers of self-government —and thus the independence of the local government itself— results not from the freedom of their decisions, and not from an autonomy such as arose in Germany in former centuries for provincial and district unions, as well as for towns and villages. The independence of self-government is rather entirely founded upon the position of the honorary office held by the officer, which, by the fact of his tenure of it, grants him a judicial independence, and which, in conjunction with the administrative jurisdiction (Chap. xlviii.) developed in the course of the eighteenth century, has had the indirect consequence, that the honorary officer can, as a rule, be only made responsible by judgment and law.

II. Economic self-government is primarily rooted in the economic communion of the small country parishes and in the spiritual needs of the ecclesiastical parish, which latter in England was pre-eminently the basis of a local parochial constitution. But legislation in early times made the most important and most valuable police functions touching paupers and the regulations of highways and bridges, the object of general regulations. This is influenced by the early introduction of payments in money into the English local government system. The economic self-government is accordingly rooted in the system of local taxes, which appear in the eighteenth century in five separate forms—

1. The *Church rate*, which has retained a more autonomic form, and is voted by the vestry according to annual requirements; on the model of this the later poor rate was created.

2. The *poor rate*, dating from the statute of Elizabeth, is assessed by the overseers of the poor, according to the necessity of the case. In the years 1748–1750, it attained an average of £730,000; in the years 1783–1785, of £2,000,000; and in 1801, amounted to £4,000,000.

3. The *county rate*, consolidated by 12 George II. c. 29, as a district rate for the courts of justice and police, is raised upon the scale of the poor rate, and amounts at the close of the century to about £200,000.

4. The *borough rate*, for the municipal, judicial, and police administration, is raised upon the same principles.

5. The *highway rate*, supplementary to labour in kind, for the maintenance of the highways, now amounts to a considerable sum, certainly more than £500,000.

By hundreds of statutes and by the practice of the courts the nature of these local rates has been established as real taxes, all which are to be raised from the "visible profitable property in the parish." According to a later report (1843), there were not less than 180,000 parochial officers annually employed in connection with their assessment. Their total, however, at the close of the century exceeded the already antiquated land tax by more than four times the amount; in the year 1803, it came to £5,348,000. These taxes are further supplemented by the rates levied by the overseers of the poor and highways, whose offices were instituted in the period of the Tudors, and who, as taxing officers of the parishes, take a somewhat more independent position. Their chief function is to assess, raise, and apply the local taxes, and to summon the vestry to pass the necessary resolutions.

Connected with these parochial offices and taxes are the vestries as organs of economic self-government. The parish meetings developed themselves first of all out of the church rate, as these contributions were originally voluntary. But the contributions towards provision for the poor, which had their origin in equally voluntary subscriptions, were very soon turned by the Tudor legislation into legal obligations, according to a legally fixed scale. There lacks accordingly for these purposes a sufficient object for independent parochial deliberations, and all the more so as the overseers of the poor are not elected, but are appointed by the justices of the peace. The case of the highway government is analogous. Since the chief current business of these vestries is confined to assessing

the parish rates, the degeneration, which is seen in the municipal corporations, is again met with here, and the place of the parish meeting is more and more taken by permanent committees. Both legislation and practice have developed this formation of *select vestries* in the following directions :—

Committees formed by custom, composed of quondam churchwardens and overseers of the poor, supplying vacancies by co-optation, were recognized by the practice of the courts as "good customs," and as legitimate representatives of the parish.

By local and private Acts of Parliament select vestries became more and more frequently formed for individual parishes on the same pattern, as by 2 George II. c. 10, for Spitalfields, the select vestry was to consist of the parson, the churchwardens, overseers of the poor, and such persons as had once discharged such an office, or who had paid the fine for non-performance. This example was followed by a number of further local acts.

By special acts, on the re-building of churches, select vestries were often appointed of the ecclesiastical parish, apart from the old connection with the civil parish. By 10 Anne c. 11, especially, a commission for the building of fifty churches in and about London, was empowered to form, with the consent of the bishop, "a select vestry, from a suitable number of wealthy parishioners in each parish," which should afterwards complete its numbers by co-optation.*

The increase in the poor law burdens and the numerous complaints brought against the administration, led, towards the end of the century, to the famous Gilbert's Act (22 George III. c. 83), which establishes new principles of pauper management, in such parishes as are willing to accept the Act. By this Act the raising of the rates was separated from the current administration, and a system of paid *guardians* was instituted. Several parishes might unite and form a union of parishes for the management of the poor, and organize a

* A survey of the conditions in a number of parishes in rather later times is given by the Reports on Select and other Vestries, 1830, No. 25, 215.

workhouse with a view to putting industrial occupation in the place of pecuniary alms.**

The centre of the economic self-government is thus to be sought in the parochial offices, the discharge of which is uniformly enforced by law.

III. **The necessary cohesion between the magisterial and economic self-government** is brought about by the fact that the higher officers of the self-government form the court of higher instance of the parishes, so far as this is necessary for securing the due execution of the administrative laws by the local board. This hierarchy of office supplements the administrative law, being bound up with the central departments of State and the central courts. The local rating system completes the financial administration in a rationally ordered relation to the general State taxation. Both elements are inseparably blended together, yet in such a manner, that in the one the character of the magisterial department is especially prominent, and in the other the element of taxation is the chief factor, and is only controlled by the magisterial department.

The whole system manifestly converges in the police administration. The police power has now become the immediate political bond of European society as now constituted, and is therefore in England as various and as comprehensive, and pervades all the social relations of civil life in the same way as on the Continent. In England there is wanting no function of what we call the "*Polizeistaat*," yet with this difference, that the police is not controlled and administered by agents of the central government, but by honorary offices, by men of property and education; in the towns by unpaid notables, who have a permanent office by virtue of royal

** Gilbert's Act is the pattern for the total poor law reform in the nineteenth century. On the other hand, the representation of the ratepayers in the English borough administration was first instituted in the system of elected representatives by the Municipal Act of 1835. The creation of an elective representation of the ratepayers of the county rate, that is, a representative body side by side with the bench of magistrates, who are appointed, not elected, has often been attempted by modern bills, but has not yet become law.

appointment. By their efficiency, these commissions of the peace have thrust back from them the superintendence residing formerly in the central government, have transferred the old powers of the privy council to a reference to the law courts as to questions involving legal principles, and have referred all else to a "correspondence" between the lord lieutenant and the Home Secretary. But the important element, which this local government brings with it into Parliament, is the intimate acquaintance with public business. Quite three-fourths of the members of the Lower House were, down to the first Reform Bill, practical administrative officials in this sense; not in the service of the party governments, but in a position of full independence, which even under party changes has maintained the integrity of the administration, and as a court of higher instance for economic self-government has preserved an impartial character.

The weak side of the system is certainly to be found in the executive organs and the ministerial officers of the local government, especially the constables, who even in the eighteenth century were reduced to such a subordinate position, that it was only too frequently necessary, by the imposition of fines, to force men to take the office. Complaints against the overseers of the poor and of highways, in consequence of their reluctant, negligent, and mechanical method of discharging their duties, are in this century very frequent. A certain want of spontaneous activity is on this account also observable in the administrative system of the municipalities.* But

* In the urban parishes the system of churchwardens and overseers of the poor and of highways, as well as the rating indispensably connected therewith, is similar to that in the country. But it must be remembered that this new formation had taken its own independent course, without any connection with the old municipal government, which, having sprung from the old court leet, served for the judicial and police administration, for the office of justice of the peace and the formation of the jury, as well as for the government of the old municipal property. In towns which consisted of several parishes, this separation was externally noticeable, as every parish, for the purposes of poor law and highway administration, did not form a mere quarter of the town, but an independent community with independent rights and duties. The citizens, too, for these purposes, consisted of persons of different positions. The duties of the parish were performed, and a voice in the vestry was enjoyed by all parishioners; whilst a share in the municipal

in general the excessive number and the variety of the smaller offices and the jury service kept alive even among the enfranchised middle classes a knowledge of public business and an interest in it.

Scanty as are the statistics of the eighteenth century, they yet allow of an approximate estimate of figures. We find at close of the last century in England and Wales 3800 active justices of the peace (among them dukes of royal blood and numerous lords); at least twice as many gentlemen as militia officers, deputy-lieutenants, and sheriffs; about 10,000 jurors at the county assizes, and four times a year at the quarter sessions. And then in about 14,000 parishes and townships, changing once a year, at least one constable, an overseer of highways, two churchwardens, from two to four guardians of the poor, and other sub-offices and committees—perhaps about 100,000 persons, who were employed in assessing taxes alone. The sum total of this activity forms the material part of the internal government of the country; all developed out of the simple elements of the State as it existed in the Middle Ages. It is the "State" in those functions, which transform the character of society, and accustom the people not merely to run after money and pleasure, but to gain the practical understanding of, and the right sense for, what is necessary to the common weal.**

It is manifest to what an extent this personal activity in the service of the commonwealth must influence a body of electors,

government was only accorded at most to the old suitors of the court leet, but generally only to the capital burgesses, or a similar small body.

** Self-government forms the exact contrary of the ideas of the nineteenth century of a representation of "interests," which as such can attain to no unity in the State. The county, borough, and parochial unions are not local parliaments. These intermediate processes between the State and the individual are not intended to foster the interests of the individual, but to accustom the individual to fulfil his public duties. Self-government forms just as much a contrast to autonomy, which has produced upon the Continent an all-pervading separatism in provinces, districts, towns, and smaller communities, owing to the laxity and passiveness of the executive power. It is a mere playing with words to call every tendency towards self-help, "self-government." The English self-government gives comparatively little scope to the local and individual will, but grants all the greater political rights by uniting the equally organized communities to a whole in Parliament.

that in the eighteenth century was limited to 200,000 at most. For this reason the county and parish unions became the most important sub-structure of the House of Commons, to which we shall again refer in Chapter l.

CHAPTER XLVIII.

IV. The Development of the Administrative Jurisdiction.

Since the days of Magna Charta, a number of new administrative principles had been proclaimed in England, first in the royal charters, and later in assizes and in parliamentary statutes, in the confidence that the principles thus laid down would be adhered to. Similarly, in modern constitutional charters, a number of "fundamental rights" are enumerated, in confidence in their *bonâ fide* execution. But England early experienced that, under a party government, these principles are not followed, and centuries later the misgovernment of the Stuarts showed that even a degenerate monarchy did not bind itself to the most solemn legal sanctions, that the responsibility of the ministers was not sufficient for this purpose, but that a special legal protection was needed by the subject, in order to guarantee the legal course of the innumerable magisterial acts, which day by day are encountered within the sphere of individual rights.

The ordinary courts proved insufficient for this purpose; for the *ordo judiciorum* was limited from the beginning to customary methods of action (*legis actiones*) for the protection of private rights, and for giving penal satisfaction. The newly created legal provisions for the exercise of the rights of political sovereignty, at no time came within the sphere of the competence of judge and lawmen or of judge and jury.

The ordinary civil courts, indeed, serve indirectly to regulate the limits of public law, so far as they render the official answerable who, by exceeding his official powers, injures a

private individual, *extra officium*. Furthermore the claims of the State upon the purse of its subjects are brought within the legal pale by the constitution of the Court of Exchequer as a common law court. The *actiones adversus fiscum* are, in England, only addressed to the Lord Chancellor by way of petition, but afford, in the result, a sufficient protection.

Further, the ordinary courts of criminal law serve to define and interpret the public law by establishing, in their decisions as to high treason, sedition, assaults against peace officers, and other delicts against the State, important precedents in questions of administrative law, which no Government can disregard. In still wider spheres they decide, by their penal sentences on abuses of office, the competence of all organs of the Government. Still more extensively, they secure, by their judgments, the interpretation of the laws affecting the police, customs, taxes, and royalties. In England this has taken the form of a summary jurisdiction, by which one or two justices of the peace administer justice over the wide field of police excesses, frauds, and contraventions of the customs, taxes, post, and stamp laws, by which means about the half of the police and financial law is placed under a sufficient legal control.*

This legal protection, however, is still insufficient for the needs of a constitutional State, because of the inevitable influence of the party system upon the Government. For official excesses, malicious abuse of office, as well as other matters within the jurisdiction of the ordinary courts, form only the minority of the excesses compared with the endless chain of abuse and mischief that may result from the tamperings of a party Government with the police, financial, and

* This vocation of the common law courts has in England never been overlooked, and has adhered strictly to the national principles of our administration of justice, according to which the court has to try independently every major supposition of its decision, unbiassed by any previous decision of any administrative body. The limitations of justice in the case of officials and as to *actes administratifs* which is peculiar to French law, is foreign to English law, and in England could be dispensed with, owing to the fact that the common law courts discharged also the functions of a supreme administrative tribunal by their writs of mandamus, of *certiorari*, etc.

military powers of the State. England experienced this to excess in the Middle Ages, but most of all under the Stuart Government. The Stuart system of Government in this sphere also brought about the full development of a reliable legal control over all those parts of the administrative law which were exposed to the abuse of party. The legal protection afforded against it, forms, on the Continent, the so-called *administrative jurisdiction*—that portion of the political structure that may be least of all overlooked.

As formerly in Germany the first institutions of the kind were attached to the Imperial Court of the Holy Roman Empire to enable it to interpret and carry out the *polizeiordnungen* of the realm; in like manner the English control has become developed in the police laws, which form the centre and foundation of the system, to which are attached the less important departments in analogous application. But the administrative jurisdiction in police matters presupposes the distinction between two materially different kinds of administrative laws, which may be distinguished under the names of *police penal laws, and police administrative laws.*

The first class, the *police penal laws,* is addressed to the subjects, and comprises those parts of the police regulations which can be enforced by simple and direct commands and prohibitions. In this great province of police law, which is based upon daily recurring uniform needs of civil order, there was no necessity for new institutions. The summary penal jurisdiction of the justices of the peace handles this department in England in a short criminal procedure on public prosecution, under the name of *convictions.* The system of legal remedies by appeal, in this case, is in England comparatively limited, and has no special peculiarities.

The other class, the *police administrative laws,* on the other hand is addressed to the officials, and includes such needs of the civil order as cannot be satisfied by simple commands and prohibitions addressed to the subjects, but can be met only by magisterial orders, decrees, and measures adapted

to the individual case, after previous examination of the circumstances, expressed in England by the term *order*.

The magisterial activity is thus divided into the two spheres of *convictions* and *orders*. A supplementary administrative jurisdiction was only needed for this latter department (for the administrative laws in the narrower sense), that is to say, for those laws and ordinances which direct the action of the officials. The legal control of magisterial activity can, however, as experience teaches, be properly effected only within the magisterial sphere itself. Even in the Norman administrative system a considerable number of administrative controls had been created for this purpose, all of which reached their normal height in the Tudor period (above, p. 217) in the following manner:—

By the disciplinary or corrective penal law, the officials were forced to fulfil their duties as required by law, under pain of dismissal or summary punishment by fine.

By virtue of the superintendence *ex officio* an illegal or improper act of the authorities is annulled or altered by the superior court or council.

A remedy of complaint finally arises through the double position of the court or council exercising the supervision. An illegal or improper administrative act is quite as often, if not oftener, invalidated on the motion of the injured party as it is officially.

In the Tudor epoch, in addition to the common law courts as the higher court of the *justiciarii pacis*, the Privy Council was a general supervisory court of higher instance, in which complaints might be lodged, and which subjected the administrative acts of the lower authorities to a revision, annulling or altering them according to circumstances (*vide*, p. 218). The gross abuse of these royal powers under Charles I. led, however, to the abolition of the Star Chamber (16 Charles I. c. 10), whereby every jurisdiction of the King in council, and every kind of legal decision, on complaint, petition, or otherwise, is withdrawn from the Privy Council; so categorical was the language of this Act, that no minister of the Crown

dare countersign a writ which decided a legal question in dispute, without immediately exposing himself to impeachment. But, as the lodging of complaints before the King on appeal was still constantly in use by injured parties, and as such an institution was indispensable for redressing just complaints in the administration of the country, it was accordingly henceforward exclusively left to the justices of the common law courts to issue the proper writs, in the name of the King, in complaints on appeal.* The modern procedure was formed readily enough from the continual connection of the royal council with the common law courts, in

* The limitation and definition of this administrative jurisdiction is dependent upon an interpretation, which the courts of common law had to give to the complex stat. 16 Charles I. c 10. In the preamble, *petitions or suggestions made to the King or to his council*, are spoken of, and further a prohibition, *by English bill, petition, articles, libel, or any arbitrary way to determine or dispose of lands, goods*, etc., *to determine any matter or thing in the said court by any judgment, sentence, order, or decree*, etc., with express reservation of a *habeas corpus* in cases of arrest—that is, all sorts of complaints against material decrees of the administration, which immediately contain an encroachment on the property or the liberty of the person. Herein the courts of common law have, however, secured to themselves an unusually wide discretion relative to the question of lodging complaints and proving facts, as well as with regard to the practical needs of the administration, and furthermore, when in doubt, have followed the maxim: *boni judicis est ampliare jurisdictionem*. The English central courts thus took up a position analogous to that taken in Germany by the *Reichshofrath* and the *Reichskammergericht* as a supreme court of appeal in complaints arising from imperial and provincial police laws. Here, as well as in England, these questions of administrative jurisdiction form their own special department, quite distinct from the ordinary civil and criminal jurisdiction, and display the following characteristics:—

The order (police-resolution, command, or other administrative decree) is the resolution of the authorities as to their own legal competence, and according to the nature of it the legal steps to be taken vary.

The administrative complaint is accordingly characterized as being the subsequent testing of a *decretum* of the authorities from the point of view of its legality (*revisio in jure*).

There is on that account no *actio* for the recognition of an individual right, but a *querela* for wrongful application of the rules of administrative law; the maxim *tot sunt actiones quot sunt jura* is not applicable in this case, but it is an *imploratio officii judicis*, uniform in all its parts, consisting in an appeal to the higher authorities.

Because, therefore, the question is one of the subsequent testing of an act of official authority, the decisions of the superintending authorities are held to be concurrent, and there does not arise a *res judicata inter partes*. For this reason the ordinary proceedings are not resorted to, but (as in the German Reichsgerichte) a procedure by writ of certiorari, writ of mandamus, and other supplementary writs.

Finally, the legal complaint is limited, according as practical needs require, to more important cases (*causæ duriores vel atrociores*, as the practice of the German court called them), that is, upon the ground which is known by experience to be exposed to the abuse of party.

the person of the Chancellor, through whose *officina* the writs also passed. Administrative complaints of the highest instance were now assigned to the *justiciarii regis* to be tested and decided. The highest court (generally the King's Bench) became thus the supreme administrative court, not by virtue of the old ordinary competence of the courts, but by virtue of a newly created legal control for all magisterial and official departments, which arose only in the later Middle Ages (as in Germany).

In England, as in Germany, however, it was soon found that a bench of judges, placed at a distance, can scarcely determine such disputed points otherwise than according to the reports made by the subordinate departments, and has accordingly little effect in redressing the abuses of the police power. In order to give effect to these legal complaints, there was needed rather a further development of the magisterial system in the provincial and local spheres, such as was formed in the larger German provinces in the seventeenth century by the permanent *Verwaltungscollegien*.

But in England no "separation of justice and administration" was necessary for this purpose. The office of justice of the peace was originally at once a police and a judicial office (*custos et justiciarius pacis*). It had further developed itself in this spirit. It now comprised and combined in itself a power of preliminary examination, a police magistracy, and a court of higher instance for the parochial government; the quarter sessions were at once a criminal court and a county government board. There was no reason for altering this system. For the justice of the peace stands near enough to the local police to be able to examine into the necessity and the reasons for any police act; he is placed in the midst of civil life, that he may keep himself free from bureaucratic partiality. He possesses, moreover, the full independence of the judicial office by his property, and in like manner the permanence of the judicial office, since the honorary official cannot be dismissed on party considerations. The experiences made on the latter point in the Stuart era were so dis-

couraging, that no later ministry in England ever again attempted to dismiss the justices of the peace as a party measure. Habitual activity and co-operation on the bench with others in discharging the magisterial duties combines in the honorary office the sense of honour and duty of the higher class, and the same feelings of a professional justice, in one single person, and thus produces the character of the judicial office in its best form.**

In consequence of this permanent combination of a police and judicial office, the administrative sphere in England retained the name and character of a *jurisdiction*. As in the canon law the name *jurisdiction* was retained for such functions of the higher administration, so here also was the form and spirit of an administration of justice preserved.

All decrees of the police authorities, which affect the person or the property of the party concerned (distinct from mere formal decrees, precepts, warrants, etc., by which proceedings are begun), are issued in the form of an *order*, *i.e.* a formally framed written resolution, drawn up by a clerk, and in more important cases signed by a second justice of the peace as well.

Against this order, from which in the Tudor and Stuart epoch complaint could be made, as a matter of course, to the Privy Council by removal of the action by writ of certiorari, and only in exceptional cases by appeal to the bench of justices of the peace, there was instituted in the eighteenth century by numerous parliamentary statutes an appeal to the general and quarter sessions of the justices of the peace.

** In Germany the development of the magisterial system went hand in hand with the separation of justice and administration, as the experience had been made, that the customs, views, and procedure of the judicial office were not suited to the administration, and *vice versâ*. In the place of the *querela* of the central courts now came in Prussia and elsewhere the *Geheime Staatsrath*, the provincial *Regierungscollegien*, *Landräthe*, etc. The necessity for the separation of justice and administration only applies to the professional bureaucracy in its proper and accustomed departments. It does not apply to the system of honorary offices, upon which the English magisterial system has been for centuries built, and upon which it has arrived at full development. The reasons why, after an experience of two centuries, the higher honorary offices cannot be dealt with in respect of appointment and dismissal, to suit the changes of party, are given in Gneist, "Self-Government," pp. 485, 486.

The controlling jurisdiction of the central courts begins now to be curtailed, so that the parties are generally prohibited from applying to the central tribunals for a writ of certiorari.

According to the system of the eighteenth century, the majority of orders made by justices of the peace, in less important questions, are *ipso jure* final.

The more important cases are adjudicated upon by the justices of the peace in their corporate capacity, in the greater and petty sessions, and in the great majority of these cases also this decision is final.

Only in a comparatively small number of disputed administrative acts (now less than one hundred annually) the quarter sessions are appealed to, and in quite as few cases the common law courts. The course of procedure of police administration is as follows:—

1. The ordinary administrative court of first instance is formed by the *single justices of the peace*, who issue orders in the police department, especially such as affect public safety, order, public morals, health, the poor, highways, water, field, forest, fishery, trade, building, and fire, and particularly numerous orders against begging and vagrancy, as well as regulations of wages, servants, apprentices, and day labourers on the basis of Elizabeth's legislation. In many of these cases an order of two justices of the peace is prescribed, who then co-operate in the forms of a summary proceeding.

2. For more important police-resolutions of a court of first instance the *special sessions* of the justices of the peace of a hundred form a kind of court of intermediate instance, the periodical formation of which falls as late as the eighteenth century. The older laws had already provided for a meeting of three or more justices of the peace for certain matters. For the appointment of overseers of the poor even all the justices of the peace of the hundred were to be summoned together, etc. Occasion was thus given for a periodical meeting of all the justices of the peace of the hundred, which could also be practically utilized for the discharge of other administrative business. The chief town in the hundred was

generally fixed upon as the place of meeting, a chairman and a clerk to the justices were chosen, and the order of the proceedings was determined. Legislation since the eighteenth century has referred the appointment and confirmation of parochial officers, highway disputes, the grant of wine, beer, and spirit licences, and other matters requiring decision, to such special sessions, so that these sub-districts form an important intermediate stage of the administration.

3. The *quarter sessions*, which bring together all justices of the peace at least four times a year, are primarily a court of appeal from penal sentences; but at the same time also a district government board for the most important general business of the district: the making of the county rate, the appointment of treasurers of the county chest, and governors of the county prison and house of correction, for the issue of police regulations affecting the price of provisions, wages, etc. (according to the system of the Middle Ages), settlement of fees of the county officials, granting of licences for powder-mills, etc., and the registration of dissenting chapels (1 William and Mary, c. 18)—a great mass of discretionary business ordinarily known in practice as the *county business.*

With this county business is connected the hearing of appeals from the orders of individual justices of the peace and the petty sessions, whenever an appeal is expressly allowed by the statutes, as was generally done in more important questions in the administrative statutes of the eighteenth century, with the further clause that an application to the central courts by writ of certiorari should no longer be allowed.***

The appellate jurisdiction of the courts of common law

*** This interposition of the quarter sessions as a court of appeal for the final decision of disputed cases is connected with the striving after power of the dominant class. Whilst the quarter sessions only form a court of higher instance in a few statutes of the preceding period, since the Restoration the statutes more and more frequently allow an appeal to the general sessions, which are now in cases of summary convictions the regular court of appeal, and the court of higher instance for complaints from the orders below. Even to-day the historically explainable rule exists, that an appeal to the quarter sessions only lies where it is expressly given by law, and that the remedy to the courts of common law by writ of certiorari is only taken away, where it is expressly taken away by law.

retires more and more into the background, as the decisions falling within the sphere of the office of justice of the peace become final, and at this period is exercised in hardly more than one hundred cases annually, with the following distinctions :—

1. A *writ of certiorari* is the normal legal method, by which, on motion, a police order that has been issued is sent to the higher court for decision as to whether the administrative act is in accordance with existing law, whether the court is competent, and whether the administrative law has been rightly interpreted. This constitutes, in fact, a kind of *revisio in jure*. This legal remedy exists as a rule for every oppressed party, where it is not expressly taken away by law. But even where no *certiorari* is reserved by law, it yet remains in force for cases of absolute incompetence and absolute nullity of proceeding. It is also always employed, in the public interest, and can be resorted to by the ministry for the time being, by its attorney-general or other legal representative. (*a*)

2. Against coercive measures by imprisonment the universal legal remedy is the *writ of habeas corpus*, controlling not merely the question of arrest in criminal proceedings, but every administrative execution in police, finance, and other cases. As arrest is, according to the English system, the ordinary coercive measure for enforcing the regulations of the

(*a*) It was only since the time of the Restoration that this legal remedy began to be withdrawn from private parties. By 12 Charles II. c. 23, 24, the right to a *certiorari* was taken away in certain taxation cases. By 3 and 4 William and Mary, c. 12, all highway disputes are to be settled in the county, and no indictment and no order shall be appealed from by *certiorari*. In like manner by 1 Anne, c. 18, disputed questions as to the repair of bridges; but where "the right and the title to repair is called in question," the matter may come by report to the King's Bench (5 and 6 William and Mary, c. 11). In this way accordingly the legislation proceeds. The use of this remedy was moreover rendered difficult by the high bail required for the action and other formalities (8 and 9 William III. c. 33; 5 George II. c. 19, etc.). In later statutes the exclusion from a right to a *certiorari* became a standing clause. The exceptions, for instance, in bastardy, excise, highways, poor, turnpike acts, etc., show us that the appellate jurisdiction of the courts of common law shall remain open, wherever considerable interests of property, fundamental rights, and principles of public law are involved. The difficulties attending the *certiorari* led in practice to a simpler mode: that the lower tribunal sent up a *special case* (*status causæ*) to the court of common law for the decision of the question of law. The simpler mode has become very popular in modern legislation.

administration, the *habeas corpus* in the central courts took the form of an universal legal control of the administration in the stage of execution. (*b*)

3. A general subsidiary legal measure is further a *writ of mandamus* for enforcing the injunctions of administrative law against towns, corporations, and all other authorities and private persons, where the ordinary supervisory jurisdiction, the system of disciplinary punishments and that of the ordinary legal measures, proves insufficient. This supplementary writ fills all gaps, which owing to the unequal development of the police powers are to be found, especially in the municipal governments, and replaces also the measures of *Zwangsetatisirung* which occur in our administrative systems in Germany. (*c*)

This system of administering justice in the police department, forms, as before said, the centre of administrative justice. The numerous experiences of the English party struggles have shown those weak points where party influence threatens administrative order, and where, accordingly, the ordinary supervisory jurisdiction needs to be strengthened by judicial elements. The administrative police laws have at all times shown themselves as being most in need of legal protection, and among these again the police licensing system is especially prominent, as being particularly exposed to the abuse of party. The other departments of administrative justice are analogous and supplementary.

In the province of the *militia administration*, the deputy-lieutenants exercise in their special and general meetings an

(*b*) It is the rule of common law that where the law empowers a justice of the peace to compel a person to any action, and the party there present refuse, the justice of the peace may send him to gaol, until he obey (Hawkins, ii. c. 16, sec. 2). To avoid the hardship of this administrative compulsion, the English statutes insert in many thousand clauses the penalty of fines and distraint, whereby the matter is decided in a summary manner. But imprisonment remains everywhere a supplementary coercive measure, as the *habeas corpus* remains as a legal control.

(*c*) There is no point in the English self-government at which the execution of the administrative laws is not secured by corresponding measures of enforcement. The other *writs of prohibition*, or *quo warranto*, etc., supplement the legal controls, especially in the province of ecclesiastical and financial matters.

administrative jurisdiction for disputed questions of military duty, immunity from service, etc., perfectly akin to the magisterial administration of justice.

In the province of *the standing army*, the office of justice of the peace confines itself to the specific maintenance of the Act relating to recruiting and a few subordinate points.

In the province of *local taxation*, the special and general sessions of the justices of the peace are the ordinary tribunals for the decision of disputed assessments.

In the province of the *central taxation*, for such taxes as are to be raised by assessment *in concreto*, impartial decisions are guaranteed by means of the commissions of assessment.

For the *municipal* government the writ of mandamus in many ways acts as a supplementary legal control, particularly applicable to illegal resolutions of the representative body.

In the *ecclesiastical* department, the legal control is given by a *recursus ab abusu* before a specially appointed ecclesiastical court (court of delegates), and partly also by writs of the central courts.†

In its general result the administrative jurisdiction makes the enforcement of administrative laws, *so far as in any point there is danger of a misapplication of them for party, and especially for election purposes*, independent of the ministry in power. The whole internal government of the country is, in consequence, unaffected by changes of government and by that

† As to the administrative jurisdiction in ecclesiastical matters, cf. Gneist, "English Verwaltungsrecht," vol. ii. chap. vii. Our German so-called *Verwaltungs-jurisdiction* is purely the result of the need for strengthening the control of the administration, so far as is necessary to ward off the abuse of magisterial power by parliamentary parties. For the daily action of the administration in England also, the supervisory jurisdiction and other administrative controls are regarded as sufficient. No one has ever yet entertained the idea of a "system" of administrative jurisdiction. The table of competence for the sessions of the justices of the peace alone (Keeming and Cross, "Quarter Sessions," 2nd edit. 1876, pp. 354–476) comprises more than one hundred headings of appeals in administrative law, with innumerable variations both in times and procedure. A table of legal remedies in the central court, as supreme administrative court, a table of cases, etc., would, perhaps, be ten times as large. An attempt at a systematic arrangement has been made by Gneist, "Self-Government," 3rd edit. 1871, chap. v. sec. 7. Neither the English nor the French *jurisdiction administrative* has as yet gone beyond the method of an empiric limitation, as need requires.

party influence which the majorities for the time being in Parliament could bring to bear upon the *personnel* and maxims of the administration. The experience of many centuries as to the disastrous consequences of the party-system for the internal government completed this laborious structure of legal controls in the eighteenth century, and thus gave the English constitution a foundation upon which the conduct of the highest State business could be left to changing cabinets, without danger to the stability of the administration, to the integrity of officials, and to the security of individual rights. Thanks to this intermediate structure, England, peculiar in this respect, has succeeded in preserving, in spite of all changes of party government, the impartiality and integrity of the central and local Government, a result which all imitations of this Parliamentary constitution have, as a rule, failed in attaining, owing to the want of the necessary sub-structure. The English aristocracy has in no other point so tenaciously asserted its vocation to rule as in this; the want of a politically educated aristocracy on the Continent has in no other point been felt so keenly as in the deficient understanding of these preliminary conditions of a constitutional system.

CHAPTER XLIX.

V. The Final Consolidation of the Ruling Class.

As the influence of the dominant class had already become established by the Restoration, the imprudent attack of James II. only conduced still further to strengthen its secure position, which was based upon personal duties and taxation. The magnates of the land had, since the days of Magna Charta, repeatedly appeared as the guardians and guarantors of the rights of the people; yet never with such a complete and entire success as in the "glorious revolution." As is the case in every political revolution, this one also was followed by an enhanced influence of the dominant class of society.

With comparative moderation the gentry now make use of their influence upon the legislation to secure to themselves by means of the electoral qualification the control of the Lower House. By 9 Anne, c. 5, the knight of the shire must have £600 annual income, derived from freehold or copyhold, the burgess in like manner £300 from real estate. The qualification for the office of justice of the peace is fixed at a higher amount, in order to secure to the landed interests the influence of the police power in the county. For the justices, who were counted by thousands, by 5 George II. c. 18, 18 George II. c. 20, an income of £100 from freehold or copyhold is required, such freehold and copyhold being inherited or held for life, or at least for a term of twenty-one years; no special qualification is needed for lords, their eldest sons and heirs, or for the eldest sons and heirs of a person possessed of an income of £600 derived from real estate. At this time arose

the custom among aristocratic families of giving, especially to the eldest son, that education in schools and universities which through the office of justice of the peace leads onward into Parliament. The justices of the peace thus qualified needed no longer the assistance of a body of jurists learned in the law (*quorum*), and accordingly it becomes more and more the rule to appoint all justices of the peace with the higher qualification of the *quorum*, and thus to make the appointment of jurists learned in the law superfluous in the commissions of the peace. A qualification with numerous grades was finally laid down for the officers and commissioners of the militia. All other limitations of the gentry and their titles was left to the practice of the courts and to custom.

Moderate as these privileges appear, when compared with the class privileges of the Continent, yet they are all based upon a well-considered system, calculated so as to concentrate every element of political power in a class essentially homogeneous, and to close up every opening where a renewed attack upon their position might be apprehended. The significance of these institutions is, when they are viewed as a whole, so thoroughly patent, that it cannot possibly be misunderstood.

1. *The military power*, above all, is secured to the ruling class by the formation of the militia under commissioners of £200 income, and a corps of officers of from £50 to £1000 income from real estates, etc. (p. 341). By its side a standing army is in an entirely precarious position by being dependent on the annual vote of supplies and the power of command in the Lower House; it is led by officers whose patents are, at the purchase price of £450 to £6000, from ensign up to lieutenant-colonel, only attainable by the sons of the gentry, a plan which also furnishes an honourable means of providing for younger sons. (1)

(1) The mistrust of the ruling class was at this point naturally increased by the growth of the standing army. Its strength of 16,000 men under George I., considerably increased during the seven years' war and the American war. After the close of the latter, 40,000 men were kept on foot in England and Ireland, who in consequence of the wars with France,

2. The qualification of £100 income from real estate as the necessary condition of holding office as a justice of the peace, further strengthened by a tacit renunciation on the part of the justices of all salaries and pay whatever, leads to a firm establishment of the *civil powers* of the ruling class. In order to estimate aright the significance of this privilege, it is necessary to call to mind the great extent of these powers, which control the whole internal life of the county and the government of the parishes. The magisterial gentry now thrust out the professional lawyers as such from the commissions of the peace, and even give the presidentship in the criminal and administrative business of the quarter sessions to a chairman chosen from among themselves. To this must be added the political influence of the grand jury, which, at the assizes, is regularly composed of justices of the peace and analogous elements, as well as the office of sheriff, which, by reason of the heavy honorary expenses connected with it, is only open to the gentry. (2)

3. This influential position is still further consolidated by the *system of entails* which, though existing in former centuries, only in the eighteenth century became apparent in its immense political and economic importance. The social tendency of the landed interests to secure to themselves the property in the land by means of long trusts, and to exclude others from the right of acquisition, did not in England attain the fullest development, as the Crown adhered in principle to the alienability of the knights' fees (cf. above, p. 88). The inventive ingenuity of lawyers, however, found

again became a considerable army. Beside these the militia was at times in a very decayed state, and thus may be explained why in the regulations of 1763 the purchase system of officers patents appears already fully developed. From time to time we find again the militia system strengthened, at all events sufficiently so for the maintenance of internal order and the preservation of a military spirit in the upper classes, among whom personal courage and good equipment could in some degree compensate for the deficiencies of military training and discipline.

(2) The qualification of £100 income from real estate does not, indeed, exclude civic dignities who own land clergy, etc., and is not binding upon the municipal commissions of the peace; but for the great county union it gives the landed gentry a decided ascendancy and a firm political organization, which, owing to the concurrent powers of the commissions of the peace, also pervades municipal life.

the way to construct entails, by which the inalienability of the land is settled in favour of an heir, and can, by constant renewal of the arrangement, be continued from generation to generation. This preference, not in itself very extravagant, kept back in England the natural development of tenure. In the eighteenth century, by commerce and colonial possessions, an immense accumulation of capital had arisen, which the gentry, in order to gain political influence, invested for the most part in the purchase of land at home, for this purpose buying up the medium-sized and small estates. It was this combination that gave rise to the present accumulation of real estates, which unites four-fifths of the profitable land in the hands of seven thousand of the nobility and landed gentry. (3)

4. The gentry class thus built up from below, accordingly reserves to itself the *exclusive composition of the Lower House* by persons chosen from among it by virtue of a qualification of £600 annual income from land for the county members, and £300 for the burgesses. Still more effectually do the heavy expenses of every parliamentary election, and the system of unpaid representatives, which, since the seventeenth century, owing to their tacit refusal to accept any remuneration, has become a point of honour and a rule, serve the same end, and thus render the entrance into the most powerful body in the realm only accessible to the richer and richest members of the gentry. (4)

(3) A clear survey of the difficult system of entails is given for German readers by Thomas Solly, "Grundsätze des Englischen Rechts über Grundbesitz und Erbfolge," Berlin, 1853, and also by Von Ompteda in the "Preuss. Jahrbücher," 1880, vol. xlvi. p. 401 *seq.*, together with a statistical survey of results arrived at by Arthur Arnold ("Free Land," 1880), viz.: 7000 landowners, as possessors of 10,900 estates of more than 1000 acres, are in possession of more than four-fifths of the profitable soil in the United Kingdom; the peers alone are in possession of almost one-fourth; in Scotland five peers are in possession of quite one-quarter of the soil; one-half of England is in the possession of 150 persons, one-half of Scotland in the possession of 75, one-half of Ireland in that of 35; the remaining fifth of the soil is divided among little more than 100,000 possessors of more than one acre.

(4) Here, too, the system is adhered to of attaching aristocratic privileges to burdensome performances, so as in a certain measure to buy them. It is this tendency which, since the Restoration, made a renunciation of salary a point of honour. The same tendency with deliberate prudence left untouched the gross abuses of parlia-

5. Finally, this position becomes consolidated by a *second representation of the ruling class* in their most aristocratic heads by the hereditary peerage. If in the former century the peerage had become but a powerful part of the gentry, there were now newly created by patent in the century from 1700–1800 no fewer than 34 dukes, 29 marquises, 109 earls, 85 viscounts, and 248 barons. The importance of this lies in the permanent influence secured to the landed interests in the legislature; all that is feudal in it is only name and legal fiction, calculated to secure to the first families of the ruling class an hereditary seat in the council of the realm, and to regulate the manner of inheritance. The peerage thus formed is nothing but a second honorary representation of the gentry, independent of varying election influences, from whose ranks it proceeds, and in whose ranks the whole family remains in the background, except the peer himself. The creation of 268 peers and 528 baronets under George III. denotes the climax of this position. (5)

mentary elections, which, even at the present time, make every fresh election a pecuniary sacrifice amounting to several thousands of pounds.

(5) The manner in which the peerage could still be regarded as a continuation of the nobility of the Middle Ages, is characteristic of the social conception of all pedigrees. At the time of the Reform Bill, among 249 lords no fewer than 188 asserted themselves to be of the mediæval nobility, whilst a somewhat strict investigation by Sir Harris Nicolas proved, that of the English peerage as existing in 1830, only one-third were incontestably descended from the knighthood of Elizabeth's reign, and among these only a small fraction could lay claim to baronial descent. The 9458 families who, according to a parliamentary investigation in 1798, were entitled to bear family arms, certainly contain numerous elements which correspond to the lower nobility of the Continent, and who in their time contrived also on the Continent to prove their "tournament and chapter right." But among them the majority are families of the modern gentry, who have registered their arms according to the prescribed rules. Special knights-corporations and guilds, autonomic rights of family, property, and inheritance, by which in Germany the gulf between the privileges and the political duties of the upper classes became with each successive century more extended, have certainly never existed in England. The popularity and the political influence of the great families kept this kind of self-deception far removed from the heads of society, and thus moderated the pretensions of the lesser gentry. Every one knew, for example, that the male line of the proud old Percies has become extinct no less than three times, and that the family name has passed on to the husband of the heiress-daughters; and that the Percy, Duke of Northumberland, created under George II., was Sir Hugh Smithson, son of an apothecary. The real genealogical tree of the peerage is formed by the hereditary duties performed by the owners of the landed estates for the sake of the commonwealth.

Side by side with this great increase in the influential position of the ruling class there can be unmistakably discerned a relative diminution in the political and economic importance of the English middle classes, which, in the course of the eighteenth century, makes itself more and more felt. The influence of these classes in elections is, it is true, still of importance for the conditions under which the ruling class exercises its dominion over the executive, and for the spirit in which this dominion is employed, but yet it is only a moderating element.

Throughout the whole period, the enfranchised middle class pre-eminently contained within it the elements which perform the jury-service and fill the offices of the hundred. It is still limited in the counties by the mediæval qualification for a juror (forty shillings income from freehold), and in the boroughs by active participation in the corporation. But these legal conditions have in individual cases long ceased to be exact. The qualification for a juror is at the commencement of this period increased to £10, but the franchise of the small freeholders is retained. Conversely, copyholders of £10 have now been admitted to the jury and the local offices, without obtaining a right of suffrage. By the buying up of the still existing freeholds and by the withdrawal of the squires, occupied with political life, from personally farming their lands, such an enormous increase in the leasehold interests arose, that the whole of the middle class in the country in its dependence upon the landlords was ordinarily described as "farmers." Hand in hand with this economic dependence, we perceive an ever-increasing decay of the spontaneous activity of the middle classes in parish and corporation, an increasing formation of select bodies and select vestries, and a dangerous indulgence of legislation and practice, which ever more extensively kept excusing the more intelligent trades and professions from serving on juries and discharging the duties of the parochial offices. The middle classes, as a whole, lacked a cohesion in organized bodies, such as the ruling class had in its quarter sessions, its grand juries, and corporations. The number of

electors was in the year 1768 given only as 160,000 (Massey, i. 338), and in the course of the century probably did not exceed an average of 200,000. But the weight of numbers was more than counterbalanced by the predominating influence of the ruling class. The right of suffrage of the middle classes is of importance as a protection against the better legal education and the social exclusiveness of the ruling class; that its value was well known is shown in the long conflict touching the election of the notorious Wilkes. But all political initiative and party formation has its seat in the ruling class. The pocket constituencies and the dominant influence of the gentry in all local government make the middle classes a kind of *retinue* of the upper classes, whose vote is only of importance where there is an open contest between the parties in the State, but not as against the strong common interests of the upper class.

In a still greater degree is this of course true of the whole of the rest of the people *infra classem*, of the smallest freeholders who were excluded from the franchise, of the whole class of copyholders and of the non-propertied working classes. The entirely irregular form of municipal parliamentary representation had, however, this result, that in a small number of places the old right to a vote of those paying scot and bearing lot, still continued, which brought about purely democratic election-meetings, even down to the labouring classes. In this direction the ruling class permitted every anomaly to remain intact, as well as various kinds of popular turbulence at elections, so as to prevent the idea becoming prevalent among the lower strata of the people that their class was excluded from representation. The tumultuous movements of 1780, and the proposals of the Whig opposition to introduce universal suffrage, were forerunners of the reform bill which was still half a century distant. They were hasty, and as yet quite immature proposals, and therefore these movements again disappeared for a whole generation.*

* The position of the ruling class may be regarded down to the close of the century as a perfectly firm and secure one. The bases of the aristocracy

were and remained unassailable, so long as it in reality represented an *aristodoulie*, which claimed a precedence in public duties, and which bought every single one of its privileges (in the militia as on the commission of the peace, in the influential offices of the military and civil administration, in the Upper and in the Lower House) with money and personal services, with which the lower class neither wished nor were able to compete; whilst, on the other hand, in every material point in which the most jealous social views could demand a formal equality of rank, such equality was actually recognized. It was only an essential revolution in labour and wealth which in the nineteenth century was able successfully to attack the exclusive dominion of this aristocracy.

CHAPTER L.

VI. The Formation of the Lower House.

The House of Commons, as the incorporation of the *communitates* bound together by self-government (Chapter xlvii.), consists in its now definite form of

80	members for the	40	counties of England,
12	„ „	12	„ Wales,
50	„ „	25	cities,
339	„ „	172	boroughs,
16	„ „	8	seaports,
4	„ „	2	universities,
45	„ „		Scotland, since 1706,
100	„ „		Ireland, since 1801.

In a process of formation extending over four hundred years these elective bodies have gained that internal cohesion which has made the English Lower House the most powerful body in the civilized world, and has enabled it, in spite of the apparently capricious changes of parties, to carry on the government of a world-wide empire with success. If the outward extent of these constituencies be compared, from the great county of York down to a decayed borough, their descending scale is almost like that of the old German imperial estates from the Electorate of Saxony down to the free imperial cities of Aalen or Bopfingen. But if the importance which the whole mass of these *corpora* attained in the British realm be compared with that of those in the old German empire, we shall find ourselves forced to acknowledge that the strength and importance of a national representation is entirely dependent upon the internal cohesion

which holds together such bodies among themselves and unites them with the political commonwealth. Were it merely a question of combining as great a number of intelligent and able men as possible in constituencies as nearly equal as possible, then many imitations of the English Parliament would probably achieve quite as much as the original institution. But that cohesion is dependent in England neither upon the democratic principle of local election (urban district and provincial representations), nor upon the feudal principle of hereditary estates (district and provincial estates), but upon the opposite of both, upon the system of local taxation and self-government, which again here must be set forth as being the primary basis of the English Parliament.

I. The system of local taxes in the form of a *county, hundred,* or *tithing rate* had already arisen in the days of the Plantagenets. Somewhat later, the church rate was added to these for the parishioners. With Tudor legislation the relief of the poor, the highway burden, and the duties arising from these were assigned to the parish, upon the broad basis of the tax-paying "Christian family." The amount of these local burdens increased down to the close of the eighteenth century to an annual sum of more than £5,000,000, more than that of the direct taxes, and at times equal to half the whole revenue of the State. This being the case, the legislature could not shut its eyes to the fact that State taxation and local rates could no longer continue independently of each other, that, in consequence, in the modern State there was no room for an autonomy of the townships and districts in taxation, and that the whole of the needs of the commonwealth and the whole of legal taxation must be regulated and arranged upon one uniform and systematic plan. In this arrangement the legislature strictly reserved two of the three fundamental systems of taxation to itself—the income tax, as well as the customs and excise. These State taxes were, by reason of the rapidly increasing financial needs of the British empire, much increased in the eighteenth century, and in the course of the great wars with France were extended in a

manner hitherto unheard of. On the other hand, the State abandoned the old land tax system, in order to gain the full force and capacity of expansion of direct taxation for all purposes of a village, town, hundred, district, and provincial organization,* according to the following points of view:—

That the basis of the household of a community, can only be a permanent and uniform one, independent of the annual changes in persons and property incidental to a shifting population, with which such a small household could not exist;

That on that account the burdens of the local unions should be distributed among all the appurtenances of such a community (fields, buildings, industrial works, mines, etc.), according to the capabilities of the object and not according to the income of the subject;

That to maintain the official staff of such a community the local rate should be raised from the person of the resident occupier, and be annually re-assessed;

That on that account, and in order to effect an equal distribution of local burdens among the greater and smaller unions, the poor rate of Elizabeth should be uniformly enforced for each and all the burdens of the village, hundred, and county.**

These were the points of view, according to which, from decade to decade, from generation to generation, and from century to century, the legislation, the practice of the courts, and the administration fixed the local taxes, and thus

* Hand in hand with the temporal local taxation system, in the eighteenth century the church rate was also employed, so long as it was possible, in maintaining the sole ascendancy of the national Church in perfect strictness, to force the dissenters to it, and to uphold the parish as a spiritual and temporal unity. When in later times the church rate, owing to the refusal of the dissenting parishioners, became a subject of dispute and began to fall into decay, the taxation system of the temporal village union was adhered to with the greater tenacity.

** The question, whether the rates were to be raised from the person of the occupier or from that of the owner, whether they were accordingly to be raised in the towns as house tax or as rent tax, or should be divided between owner and occupier in certain proportions, appears to be a relative question dependent upon the nature of the property and economic conditions and custom. In England the raising of local taxes from the occupier was rendered necessary by the accumulation of great landed possessions. Where hundreds of houses and innumerable leases belonged to a single non-resident landlord it was impossible to do otherwise than raise the real taxes and rates from the occupier.

maintained the material bond, which makes the *communitates* suitable elective bodies for the Lower House. The old *vicenetum* remains throughout bound together in the consciousness that all the pecuniary and other performances that were necessary to maintain civil order, poor-relief, communications with neighbouring villages, and the numerous humanitarian calls upon the parochial union—everything, in short, that in the lower strata makes a State of society—should be permanently and uniformly raised from the appurtenances of the community, which are as much the essential basis of the community as its territory is the basis of the State. The more English society was in danger of being dissolved, from its lowest foundations and elements upwards, by changes of abode, freedom of trade, cosmopolitan ideas of commerce, the roving spirit of the rural labouring population, and the increasing splitting up of the villages into various churches and sects, the more tenaciously did the legislation instinctively cling to the system of real taxation, as being the sole bond capable, where society has become revolutionized, of maintaining the cohesion of the constituencies. And in this system men were not led astray by any class interest of society. In particular the English great landowners had to bear the excessive local burden resulting from it (sometimes a local burden of 25, 40, and in certain cases even 100 per cent. of the annual value), which was in a comparatively short time satisfactorily equalized by the sharing of the excessive burdens with greater communities, and by the annually increasing portion which dwelling-houses and manufactories had to bear of the local rates.***

*** The experiments in taxation (p. 42 *seq.*) which were made in favour of the landed interest down to the close of the Middle Ages ceased with the period of the Tudors. Their place was taken, under the name of subsidies, by (1) a uniform taxation of objects (land tax); (2) a uniform taxation of subjects (property and income tax, tithes and fifteenths); (3) a uniform tariff of customs, duties, and excise. Under Cromwell new assessments were made, which were retained by the Restoration. In the eighteenth century the old system of voting periodical subsidies passed into that of the tax laws, and the periodical taxes in vogue up to that time, which the State needed year by year, were now also raised by tax laws from year to year without any special vote of Parliament, new taxes being added to them from time to time by law. In this new stage of tax legislation the

II. The *second personal bond of union* of the constituencies is formed by magisterial self-government, that is, the exercise of the higher State functions in the district, hundred, and village unions by honorary offices discharged by the upper classes—service on juries and the smaller offices by the middle classes—supplemented as need required, by certain professional officers learned in the law and by numerous paid clerks and under officials. This system of internal government of the country is not due to any special predilection, peculiar to English life, for a dilettante government by "laymen," but to the experience that the higher police duties are actually well administered by socially independent men of general education, and according to a freer and surer view of general life, than by an exclusive bureaucracy, and that any deficiency of experience in the routine of duties can be

system of customs and excise was certainly excessively extended in the interest of the ruling class. A new and considerable income tax (in the place of the tithes and fifteenths which had become merged in the land tax) was first imposed as a temporary tax during the great wars with France (1798–1815). These, like the indirect taxes, were entirely refused the communities. On the other hand, parliamentary legislation closed the book of the State land tax, made no more land registrations since 1692, declared the land tax which had fallen into decay to be redeemable (1798), so that it only still continues in a *residuum* of about £1,050,000. The room thus made had now become free for the local rates, which in the year 1803 had increased to £5,348,000, and in the course of the present century had attained the double and the treble of this sum and are still increasing. Soon after the Reform Bill, the intolerable overburdening, which had resulted from the smallness of the townships parcelled out for poor and highway rates, called forth an agitation for the "disburdening of the land," which was, however, pacified by the distribution of the burdens among greater unions, so that in recent times the heavy burden of maintaining the village schools has again fallen upon the local rates. England has been spared a class conflict on the question whether the land does not pay too much and personal property too little. I seldom find in the pages of the reports on the subject any reference at all to such a tax-grinding policy, but only the natural reflection, that in their freedom of acquisition the wealthy classes may, as they think proper, be either landowners or capitalists. The well-founded complaints are only based upon this, that by the dwarfish formation of the poor law unions in those days an intolerable burdening of certain great estates and townships resulted. A critically executed survey of these conditions of taxation is given by the former President of the Poor Law Board, later First Lord of the Admiralty, Mr. G. Goschen, in his Reports and Speeches on Local Taxation (1875). The annual value of the land was in 1868 taken at equal to £143,872,000 (for parochial taxation assessed only at £100,612,000). The total of local taxation burdening it will soon have reached the amount of £20,000,000, whilst in 1803 the whole of the annual value of the land was estimated at £34,864,000 (cf. Gneist, "Self-Government," 1871, secs. 25, 152, 160).

supplied by the numerous clerks and lower attornies, of whom there are so many in England, and in practise can be more easily made good than can deficiencies in personal character and qualities. The equally important significance of the honorary offices is that, in spite of the principle of the dismissibility of all administrative officers, it secures to the official the full independence of the judicial office; only by the insertion of these elements of judicial independence could that system of administrative justice be formed, which supports the parliamentary government, whilst the prefectorial councillors of a professional bureaucracy cannot hold their ground when confronted with changes of government and the agitation of influential parties. More important than all else is, however, the social side; namely, that this spontaneous activity binds together the disunited strata of society, in that which is common to them all, viz. the administration of justice, the maintenance of civil order, and provision for the poor. Whilst the life of society tends rather to separate than to bind together men in narrower and wider circles, in the interests of possession, acquisition and labour, in creeds and in professions, it is of incalculable value, when the same men meet together in fulfilling common civil and humanitarian duties, and learn to know and to esteem one another in their activity for the common good. This is the side which gives to personal activity within the community a value that cannot be replaced by any other institution in the world. And if in this activity the lower strata of society learn to know the upper classes not only as men who are in the enjoyment of greater gifts of fortune and wealth, but also as men who do more for the good of mankind,—who by the sense of honour, independence of thought, and character that honestly acquired property give to men, administer the magisterial office with justice and with honour,—there results a conciliatory element in view of the disparity of classes, which has in England been created and maintained by the permanent institutions of the country.(1)

(1) This personal importance of self-government has been especially enlarged upon in my "Self-Government" (3rd edit., 1871). This side has been

III. But the *communitas* attains its full importance for the parliamentary constitution by the *permanent organic blending* of self-government with local taxation, by the personal union of the magisterial and economic self-government, which is also peculiar to the municipal system of Germany. This personal union first creates for the social contrasts of property, business, labour, and creed, a counter organism, quite as durable and effectual, which again binds them together, changing social prejudice into political judgment, and producing that sense of right which enables a nation to govern itself. Above all, it is the management of the whole by the honorary office of the justices of the peace, which preserves a sense of civil order and public spirit. The constant exercise of civil duties educates and accustoms the mind of society in these elective bodies, and engenders, in those that take part in them, the consciousness of a due influence in their sphere, by continually reminding them that they have to exercise this influence by virtue of a calling they have received from the State, and only according to a law that binds them, and not by virtue of their birth or property. The social life of the county and the villages is pervaded and enriched by a right understanding for the State, by a spirit, a faithfulness and a public spirit, which absolutism even in its best shape can only succeed in making a privilege of the bureaucracy.

It is only the transformation and moderation which class contrasts receive from this local self-government, that produces those moderate political parties, which are capable of conducting a parliamentary government after the English fashion. The elections of such a body present a "diagonal" of common aspirations, in which the extreme prejudices and tendencies of the social classes have been already overcome. Thence proceed first of all those fundamental tendencies, which

altogether missed in the French municipal system, which has only considered a representation of tax-payers, and has left the magisterial administration exclusively to the prefects of the departments, districts, and townships; it has, however, been perfectly recognized in the Prussian *Städte-ordnung* of 1808, and in its imitations, especially in the Prussian *Kreis-ordnung* of 1872 (Gneist, "Preuss. Kreisordnung," Berlin, 1870).

modern times are wont to designate by the terms liberal and conservative, in contrast to the unmitigated purely social extreme parties. From out the daily life of these neighbouring, cohesive, equally responsible self-governing communities, there arises a political consciousness, which unites the natural diversity of opinions and aspirations to a common will. The majority of the elective *communitates* thus receive an essentially characteristic physiognomy, an individual character. This joint and common will of a corporate body cannot be otherwise expressed than by a resolution of the majority, as against which a representation of minorities is altogether absurd.*

Yet all this was not effected in England without a reservation for the urban constituencies. The English towns at present form two groups. About two hundred cities and boroughs in England and Wales send, as special civic constituencies, members to Parliament, as *parliamentary boroughs;* about one half of them were in the course of time incorporated by express charter, and fell accordingly under the following head.

Nearly three hundred towns have, on the other hand, since the close of the Middle Ages received a positive organization, as a rule with mayor and council, as *municipal boroughs;* to these belong also nineteen cities with the more extensive privileges of a County Corporate, which gives them also the right of having their own sheriff, coroner, and a special urban militia.**

* The working out of social contrasts with a view to a common consciousness, and not the sum total of the individual opinions contained therein, gives the *votum* of the body its importance. The greatest number of intelligent and well-meaning men since James I. voted certainly under the name of the Universities of Oxford and Cambridge, which have nevertheless contributed the strangest figures to the English Parliament. It is much the same with the elections of the great cities. Inasmuch as the internal connection of the elective bodies is the essential point, it was in principle a justifiable arrangement that an equality in the representation of the greater and smaller counties and the greater and smaller boroughs was maintained, so long as a due proportion of the represented classes of society was on the whole provided for.

** The violent mutilation of the municipal constitutions, so far as it originated with James II., was finally rescinded, but the irregularities caused by former charters of incorporation and local observance remained in principle unchanged. The decisions of the

This municipal system certainly was and remained an accumulation of anomalies, which only accidentally compensated one another. The old civic constitution of the corporation, limited to the police administration and the old civic property—the burdensome and expensive part of the poor law and highway administration in the hands of the parishes, completely disconnected with it—other parts again of the civic system in the hands of special *commissions* or *trusts;* some of the towns represented in Parliament, brought by charters of incorporation into a formal constitution; others still remaining on the basis of the now decayed, mediæval court leet; part of the incorporated towns represented in Parliament, another part not; the smallest, quite decayed towns represented like the greatest counties by two members; and finally some places that had now become great towns entirely unrepresented.

Such were the latest visible results of the representations of boroughs, heaped up upon one another without any system, and more than ten times as strongly represented as they should be. The unavoidable consequence was the subordination of the real local interests to the interests of Parliamentary parties, as the struggling parties of Parliament sought their elective influence principally in the small or otherwise normally formed boroughs, which since George III. were hotbeds of systematic bribery and corruption. The greater the number and the smaller the importance of the boroughs became, the more they fell under the dominating influence of the neighbouring large landowners. In many of these boroughs the great noble families have established themselves as securely as in the castles of the Middle Ages. The election

Lower House as to the validity of elections in boroughs remained as before sometimes influenced by party considerations, sometimes void of principle and fluctuating, and a later statute could only instruct the sheriffs always to proceed according to the latest decision of the Lower House. An endeavour was now made with the co-operation of Parliament to meet the numerous local needs of municipal government by local acts, of which we find 11 under William III., 10 under Anne, 15 under George I., 46 under George II., and no less than 400 under George III., by which new and arbitrarily formed administrative bodies, and representations of citizens were again formed. As to the caricatures of a municipal system, which proceeded from this, cf. Gneist, "Self-Government," 1871, sec. 73.

statistics of the eighteenth century were shrouded in a not unintentional obscurity. At the end of the century a petition of the "Society of Friends of the People" pledged itself to furnish proof that 200 representatives of towns were elected by constituencies of less than 100 electors, and that altogether 356 members were nominated by 154 patrons—without meeting with any serious refutation. This was still a sort of equalization for a borough representation, ten times as strong as it should be, certainly at the expense of the morality of the small constituencies and the interests of the middle classes, whilst the energy and the influence of the county gentry was again enhanced by these anomalies. But the representation of the boroughs in Parliament always remained the weak point of the great and otherwise harmoniously constituted parliamentary body—the undefended position which the Reform Bills of later times with good reason attacked.***

*** If in spite of all we inquire into the ultimate reasons for the prudent moderation which distinguishes the English parliamentary system from all its imitations, why it has better respected the public rights of the country than the monarchy that preceded it, why the whole change of office of an English Government by party is confined to half a hundred political offices, why with this exception a permanent professional bureaucracy and full integrity in the administration has been maintained, why the position of the judges, and the possessions and the independence of the national Church have remained untouched by party governments; the reasons are to be sought purely in the spirit of the elective bodies, from which the House of Commons proceeds, in that internal cohesion, which has given these bodies the right will to exercise their political liberty aright.

CHAPTER LI.

VII. The Position of the Upper House.

The Upper House is the necessary supplement to the House of Commons, as being the depositary of the existing system of laws, protector of minorities against majorities, and the guardian of the permanent interests of the State against the daily changing interests of society. For this reason a second representation is accorded to the ruling classes by the heads of their noblest families, independent of the changing influences of elections. The number of 166 peers that were existing at the accession of William III. was further increased in the course of the eighteenth century by 34 dukes, 29 marquises, 109 earls, 85 viscounts, and 248 barons. Among the total number of peers (372 at George the Third's accession, —at the present time (1882) as many as 512), the representation of the Established Church by two Archbishops and 24 bishops becomes an ever diminishing minority, a mere complement of the pre-eminently temporal character of the institution, which on the one side gives to the ruling class its highest privileges, and on the other to the political body of the State the requisite stability.*

* On George the First's accession the Upper House consisted of 22 dukes, two marquises, 64 earls, 10 viscounts, 67 barons, 16 Scotch peers; of these peerages there were only 52 existing at the death of George IV. It was by the numerous creations of peers under George III. that the consciousness of the internal unity of the Government with the enfranchised *communæ* and the ruling class was completed and thus that unity of action was produced in the parliamentary body which England has neither before nor afterwards possessed to such a degree. A foolish and presumptuous attempt of the nobility to limit the royal prerogative appointing peers to a fixed number, was soon understood aright as to all its consequences, and rejected by the Lower House (1719).

Since the eighteenth century the constitutional lawyers of all nations, with scarcely any exceptions worth naming, have arrived at the unanimous opinion that side by side with a popular representation, with its well-known changing majorities, a stable element is absolutely necessary, which, according to the differences in the bases of the State, and according to the nature of the social system ought, either by life members or hereditary members, or by a representation of permanent bodies, in one way or another, to obtain a higher degree of permanence in order to be a support to the existing political and social system.** Unfortunately these well-founded theories, as a rule, lose their influence upon public opinion just at the time when modern society has the greatest need of this moderating influence.

In the struggles between the Crown and the estates, England has empirically attained to that formation which in the eighteenth century appeared the natural and proper one. In its rise the Upper House had come into the world as a council of State, strengthened by the power of landed property. Into the permanent council the greatest feudatories and prelates had entered, representating the great landed interests, yet not merely property, but including those spiritual magnates who conducted the actual government of the Church, as well as those temporal magnates who were both ready and able to discharge the *ardua negotia regni* in common with the highest servants of the Crown, and who also both in political burdens and taxation everywhere stood at the head of the people. The ability of this aristocracy, acting in the very reverse manner to the old French Parliament, pushed back the merely bureaucratic element and subordinated the royal *justiciarii* and mere professional officials as assistants to the main body. The spiritual and temporal peerage, in the periodical sessions of the royal council, tacitly became a permanent body and

** The petty state, in which the elements for the constitution of a first chamber are wanting, thereby shows itself to be a *civitas imperfecta*. In reality such states exist only in subordination to a greater political whole, whether this be called a federation or a confederate state, and are only in this conjunction capable of fulfilling the duties of a "state."

an essential factor of the legislature, and also the highest tribunal of the judicial system. Its individual prominent members form in the eighteenth century the majority of the highest servants of the Crown, who under the name of the Privy Council carry on the actual Government of the State.

Where in this manner both Upper and Lower House together discharge the real business of the State, no theoretical proofs are needed of the necessity of the system of two chambers, which is of itself sufficiently apparent in the daily action of Parliament.

Without the Upper House the legislature would immediately lose its footing, or rather would not exist at all; the resolutions of the Lower House (in consequence of its exclusive financial power and its decisive influence upon changes of ministry) would, like the daily resolutions of a convention, take the place of the legislature, and the difference between the statutes and the daily resolutions of the majority would immediately cause legislation to become an empty form and a mere name.

Without an Upper House a Government according to law would at once cease, as every resolution of the majority in the Lower House would at any given moment be able even to repeal, suspend, or do away with the existing laws. The protection of the rights of individuals by the tribunals would at once be abolished, as the higher legislative power of the resolutions of the majority could at any given moment set aside both the judicial tribunals, their officers, and their judgments.

This is the hurried process through which all constitutions framed according to the ideals of pure democracy and according to the doctrinaire systems of a sovereignty of the people pass forthwith into a dictatorship, and even into an unbounded absolutism, which tears down every barrier of the executive. England, under Cromwell's short reign, had just enough experience of the one-chamber system to prevent a recurrence to it. This popular opinion was sure to become more and more firmly established, the more that the rapid change of

parliamentary majorities and ministries in the eighteenth century showed the necessity of a firm support for the legal and administrative system—a support which was no longer to be found in the Crown.***

At the same time, in the course of centuries, England practically learnt that a political body which was to hold its own side by side with the mighty power of the House of Commons must be rooted like the *communitates*, not only in property, but also in the lowest foundations of the structural edifice of the State. In fact every *communitas* contains those elements which, when concentrated in Parliament, form the Upper House. The peers, who ordinarily stood as lord-lieutenants and *custodes rotulorum* at the head of the actual county government, of the administration and the command of the militia, which was in the eighteenth century still in an efficient state, continue the idea of a leading position also in their combination to an Upper House. The principle of the royal appointment of the magistrature, which prevails in the province of the military, judicial, and police power, also continues the principle of appointment into the Upper House.† The customary self-government of the counties by hereditary landowners leads further to the recognition of an hereditary peerage, just as in an absolute bureaucratic State the nature of the office leads to the higher officials being appointed for life and to their association into a permanent official body.

*** It is characteristic of the practical views of life which arise from real labour in the State, even at the present day, that even the modern school of political economy in England, which would fain build up the State merely of interests—in the widest imaginable extent separating itself from the notion and the necessity of a right in the State—that even John Stuart Mill advocates a system of two chambers as being a necessity. The idea of the sovereignty of the people, however, changes the order of precedence. The first chamber must for the future be called the "second chamber."

† In this question also the practical views even of English radicalism recognize the necessity of *appointment* to the higher offices of authority. The estrangement of society upon the Continent from personal activity in the State could certainly not perceive the necessity of the principle of appointment for the first chamber in the monarchical State. From the point of view of society these chambers must also be elected, like all elements of self-government, beginning from the lowest to the highest. The necessity of creating the military, judicial, and police authorities by appointment, by a higher authority, and not by election, only becomes intelligible by an habitual co-operation in military and judicial duties and in the police control.

The cohesion of the individual with the whole, the uniform co-operation of the elements according to a fundamental system, gives also the English Upper House a footing in the English political and social system.

The noble Upper House too, in the same way as the Lower House, represents an organic combination of property and office—not that of an ancient and now fictitious office, continued by mere title of nobility (like the titles of nobility on the Continent), but of a living, continuous activity in the highest business of government and in the daily labours of local administration, in actual service on behalf of the commonwealth, with the complete responsibility of a public office. Just as little is it the representation of a privileged landed interest which has disappeared with the now perfectly unmeaning feudal bond in England, but of all property paying taxes and fulfilling personal duties towards the State. The position of the peers in legislation and in taxation corresponds to their quality as the greatest tax-payers, like that of the gentry in the county. In this cohesion the position of the Upper House was, in the eighteenth century, securely established.††

†† The strong movement in the ranks of the peerage and the new creations repeated from year to year prove to us that their honours are acquired honours, as in the Middle Ages. Just as the residences of the gentry in the counties are where we expect to find a great tax-payer and a justice of the peace, and as these combined together form the centre of the local and provincial government, so do they appear concentrated in the House of Lords. And this relation continues, at all events as an average rule, down to the nineteenth century. In the lists of 1855 I have counted as belonging to the English Upper House 61 lords who are lord-lieutenants at the head of a county government, 116 lords who are officers of the militia and on the militia commissions, 58 in the active army, 67 active or former ministers or under-secretaries of State, and 108 former members of the Lower House, etc. The type of the lord as a mere private gentleman, which was in the eighteenth century the uninfluential exception, is unfortunately to-day more and more on the increase.

CHAPTER LII.

VIII. The Established Church as a Link in the System of Parliamentary Government.

With great difficulty and very gradually the Established Church in the course of the eighteenth century made its peace with the reformed parliamentary State. It is nothing more than the truth if we recognize that the Church in the conflicts of the Parliament with the Stuarts ran a great risk of becoming an instrument in the hands of changing parliamentary parties. Therefore it was that, with her theories of absolute power, she so energetically supported the *jure divino* monarchy of James I. and his successors. The antagonism of the sects opposed to her was in later times silenced by the rigorous prohibitory laws of the Restoration. From that time on, the Anglican clergy had begun, both in their writings and in their sermons, to vie in dangerous competition with the Roman Catholic clergy for the favour of the two royal brothers, each religion putting itself forward as the true and sole support of the throne and of social order. The clergy was unable again to divest itself of this political character. Sometimes in favour, and sometimes in opposition, they found themselves drawn into the whirl of parliamentary parties during the last decades of the Stuart dynasty. The pulpit had become a chair of political teaching, and all the more effectively seeing that the orator found no contradiction, and that the press was still under censorship. Instead of devoting themselves to the cure of souls and to their vocation as teachers, the clergy and their two universities found a favourite topic

in the burning questions and controversies of the day, in the denunciation and refutation of opinions displeasing to themselves. In their zeal for the *jure divino* monarchy, however, they were so often injured by the Stuarts, and at last so grossly deceived by James II., that they finally joined the cause of the party of resistance, and even by their own resistance gave the signal for the outbreak of the "glorious revolution."

By the second revolution and the change of dynasty, however, the danger of their subjection to a variable system of rule by parliamentary parties became more threatening than before. In unconquerable dislike to such a state of things the clergy very soon returned to the colours of the Stuarts. The political secession of the "non jurors" continued for a generation in open antagonistic opposition to the reigning dynasty, and traces are even perceptible down to the commencement of this century. But as the Whig ministries appointed Whig bishops, the estrangement between Church and State was followed by an estrangement between the higher and the lower clergy, and a further consequence was a bitter feud between the doctrines of the *High Church* and those of the *Low Church*.

There lay, however, in the ecclesiastical system a contrast to the parliamentary system, which makes the two organisms appear like opposite poles. Benefices, chapters, universities, and colleges cannot be governed like temporal *communitates*, nor the office of instructor administered like that of a police magistrate. All applications of a parliamentary constitution to the Church only result in a predominance of extreme tendencies, a bitter party strife (which, being a struggle for creeds, cannot be allayed by resolutions of a parliamentary majority), and above all in constant conflicts with the temporal Parliaments. The spirit and the objects of Church doctrine and the cure of souls necessitates, very differently from a parliamentary constitution based upon self-government and taxation, a standing and perpetual ecclesiastical government with complete supervisory powers, perfectly dis-

tinct from all temporal party interests. An application of social and parliamentary formations has accordingly at all times only been practicable when subordinated to a strong ecclesiastical government, and then only in questions of ritual and property.* The ruling class in England had before its eyes the vivid picture of the dangers of an ecclesiastical parliamentarism, not only from recollections of the disastrous system of the Presbyterian Churches under Cromwell, but still more vividly by the development of the Scotch Church, and we cannot but admire the circumspection by which, in the following manner, a *modus vivendi* was arrived at with the ecclesiastical system.

1. By *recognition of the hierarchy of the Anglican Church* according to the Episcopal system, from the archbishop's office down to the parson's; by the retention of the bishops' seats in the Upper House; by avoiding any interference with the internal affairs of the Church; by incorporating the jurisdiction of "the King in council" as a court of supreme instance in a Court of Delegates, which in later times obtained the name of a permanent division of the Privy Council. The periodical general synods of the clergy in their Convocations, which were seen to be incorrigible depositaries of clerical caste-exclusiveness, were in the long run found to be incompatible with peace in the Church, and after the year 1717, the pacificatory course was adopted of suspending their activity by summoning them in the usual manner, and, after opening the sitting by a royal commission, immediately adjourning it on account of want of business (a proceeding which lasted until the middle of the present century). The direct antagonism between spiritual and temporal parliaments was thus

* The synodal constitution of the Convocations under the Tudors was fairly well established, but only under the condition (1) of very large rights of appointment by the Crown for the members of the general synod, and of controlling powers exerciseable by the royal commissioner; (2) of a correct exercise of the royal prerogative in the spirit of Christian tolerance; (3) and of the subordination of the general synod to a royal high commission, as the highest court of the ecclesiastical state (Chap. xlii.). The second condition had ceased with the Stuarts, the third since the Restoration, and all conditions in the eighteenth century, after the non-reinstating of a high commission, had become a leading principle of the constitution.

removed. A link remained above in the persons of the bishops sitting in the Upper House, below, in the constitution of the parish. The members of the ecclesiastical system that lay between these two extremes had to be reconciled to the new order of things by the following further concessions :—

2. The *Church property* is protected and preserved by Parliament more conscientiously than in any other century; and under Queen Anne increased by a great endowment. This property represents even to the present day the income of a continental kingdom (according to the assessment of 1851, estimated at £5,000,000 annual income, and landed estates of 1,500,000 acres), as was deemed necessary in England to maintain the dignity of the Church side by side with a wealthy ruling class.

3. The *ecclesiastical benefices* by the legal fiction of a "*corporation sole*" are preserved intact, and serve, as did the incorporation of the universities, to keep the influence of parliamentary parties far removed from the ecclesiastical offices. In another direction the patronage of these offices is distributed amongst the King, the spiritual and temporal lords, the landed gentry, the chapters, the universities, and other bodies, almost corresponding to the present influence of the ruling class.

4. The Established Church still retains a considerable *ecclesiastical jurisdiction*, subject indeed to a State tribunal as a court of supreme instance, but yet with sundry magisterial rights extending even over dissenters.

5. *Conformity* to the Established Church remains the condition of entering Parliament and taking office in the State. The subtle system of the Test Acts (25 Charles II. c. 2) has extended this bond, subsisting between the Church and the dominant class, which had existed for nearly a century and a half, to everything upon which political influence in the State depends, *i.e.* to those holding any office, civil or military, or receiving pay, salary, fee, or wages, by patent or grant, etc. On the other hand the ecclesiastical possessions throughout are subject to the burdens of the parish, the

clergy are active members of the vestry, an important element of the commissions of the peace, and become gradually more and more blended together with the dominant class in parliamentary government.**

The ideal of a *united Church in a united State* was thus again attained. In practice the condition of things here was similar to that existing in continental States, in which, according to the *one-church* system, either the Roman, the Lutheran, the Reformed, or the Greek Church, was so bound up with the institutions of the State, with the family rights, the education, and the customs of the nation, as to represent an essential element of the national State. A feeling of the upper classes (we may call it tolerance or indifference), characterizes the eighteenth century in England also, practically almost invalidating the penal laws passed against Catholics and dissenters, allowing the dissenters by annually repeated acts of indem-

** Cf. as to the constitution of the State Church, Gneist, "Das Englische Verwaltungsrecht," vol. ii. chap. viii. The whole displays a picture of an intimate relation of interests between Church and State, and between the clergy and the dominant class, in which the Church preserves the essence of her constitution and the independence of her ministering office, under peculiar conditions. The dominant class has on its part so completely understood the full importance of this connection for its position among the lower classes of society, that the motto "Church and King" became and remained the watchword of the Tory party. The strong side of this system was the political side, in so far as by this means a main foundation was gained for the possibility of a parliamentary party government. All this again was certainly in some measure at the expense of ecclesiastical efficiency in teaching and the cure of souls, and had a certain weakening effect upon the education of the people and upon the intellectual life of the nation generally. After the Church had been fully secured in her corporate independence, there again supervened, as in former epochs, a slackness in the spiritual calling. No sect was any longer a serious rival; the Catholics were kept down under penal laws. The highly placed prelates and rectors thus lost in many instances their interest in the cure of souls. Even, under Queen Anne, it was calculated that the larger portion of the livings were occupied by scantily endowed vicars and curates with an average income of £50. In many places the population gradually increased far beyond the limits of the parish; but instead of forming new parishes with all the rich resources at the disposal of the Church, these people were abandoned to neglect and Methodism, which now separates itself off in a great degree from the Church, which had become too aristocratic. This is the natural cause of the growth of dissent of the eighteenth century, which was the outcome of feeling, whilst the older sects, which had arisen in the struggle against the State Church of the Stuarts, take up a distinct and separate position, almost devoid of influence. It was not until the nineteenth century that the Established Church endeavoured to repair these gross neglects.

nity (since 1727) to hold office and exercise political rights, and according all creeds in the main the legal equality of individuals in civil matters, without on that account abandoning the position of the Established Church. She remains the Church of the King and of Parliament, the Church in all decrees and acts of the State, the Church, which in exercise of her jurisdiction, her right to tithes, her church rates, and her church marriage (after the Marriage Act of 1753), treats other creeds as non-existent. For the dominant class, conformity to the Established Church is the condition precedent of the constitution—for the King in council as for the King in Parliament—recognized by Whigs and Tories alike.

This welding of the Established Church into the parliamentary state was the last decisive step towards establishing the cohesion and internal harmony, with which an even pulse returns into the life of the nation. And herewith the clergy at last ceases to be an agitating element in the struggle for power and social interests, and to vaunt itself as being the true prop of the throne and order; but it finds its conservative calling again in teaching and the cure of souls, in representing the Christian moral law, as it is incorporated in the Anglican Church, homogeneous in itself, and intelligible to the minds of the majority of the nation.***

In the dignity of their vocation, in political clear-sightedness, in patriotism, and in respect for civil society, there was probably no clergy in Europe that could equal the Anglican clergy, and if their activity was only too intimately bound up with the position of the dominant class, yet it was and remained a high vocation in its sphere, and of great and

*** This recognition of the equality of the individual believers of other confessions is something entirely different from the system of the *parity of two Churches*, which would be incompatible with the English parliamentary system. The Presbyterian Church, it is true, was the State Church for Scotland, yet only as a provincial institution, and as being a kindred church system. As to how a *two-church* system must be organized in the same state (as was the case in Germany after the peace of Westphalia by the union of Catholic and Evangelical territories into a confederation of states), public opinion in England appears to have but little clear idea, although England, since the re-establishment of Catholic bishoprics in the country (1850) is brought face to face with the same problem as Germany.

important influence upon the present legal order of the State, which thus stood on a secure foundation in a universally recognized doctrine of the Christian moral law. This position of the State Church was the latest development in the organism of parliamentary constitution, but not the last in point of effectiveness.

CHAPTER LIII.

IX. The Relations of the Crown to Parliament—The King in Council and the King in Parliament.

Upon the thus consolidated basis of the hereditary succession of self-government, viz. the ruling class in their Upper and Lower House (Chaps. xlv.–lii.), there now becomes developed a new position of the royal council as regards Parliament, which for more than a hundred years, under the name of a "parliamentary government," has as an ideal of a monarchical constitutional government, stood before the nations of the civilized world as a goal to be attained.

The Revolution had preserved the royal office, not as a monarchy of divine appointment, but as an hereditary monarchy of human institution, with a parliamentary title, to be compared with the accession of Henry the Seventh. The English State remained accordingly a monarchy, and indeed a constitutional monarchy with a double organization; as *King in Parliament* and as *King in council*, that is, the King, in exercise of the executive power, is bound either to the consent of the one or to the assistance of the counter-signature of the other. The old powers of the Crown still continue, though from time to time enlarged, limited, and modified by the legislature, that is, by "the King in Parliament." These powers have become divided among a number of constitutional departments (courts, commissions, and boards), all at length converging in the "King in council," the King as head of the now so-called executive power. The events of

1688, however, have produced changes in the relation of these powers, which also react upon the form of the central administration.

I. The Privy Council is still the constitutional seat of the Government, but with essential limitations of functions as also of persons.

The supplementary power of the King in council to issue ordinances still continues; but as the sovereign rights are to the widest extent fixed by statute, and become continuously more and more fixed, the ordinances are restricted more and more to colonial and foreign affairs, to executory ordinances and instructions to officials.

The power of the council to decree *extraordinary measures* of temporary government has not been expressly abolished; but, since all power of dispensing with and suspending parliamentary statutes has been taken away, the more important measures pass to Parliament in the form of private bills, etc.

The jurisdiction of the council in civil and criminal causes disappeared with the Star Chamber; all that has remained of it is only a right of preliminary inquiry. To this were added the following further changes:—

The permanency of the judges' office was made a rule by 13 William III. cap. 2;

The whole police administration, the superior jurisdiction of the local government, the militia, and everything that is liable to abuse of power from above, was "de-centralized," by an endless series of statutes, and placed under a system of administrative justice;

The Church has attained her independence of the ministry in power;

The Upper House finally, has become so consolidated, as to enable it to take again, as in the fifteenth century, the position of an independent council of the realm.

The practical centre of gravity in the governmental system now lies essentially in the deliberation of the King, touching the summoning and dissolution of Parliament, and the bills to be laid before it. The present council in its deliberations

deals with measures of foreign and colonial policy, with the introduction of new laws, with temporary measures, and with the re-appointment to vacant offices; that is, with business for which the ceremonious sittings of a numerous body appear actually neither necessary nor suitable. All functions, for which the permanence and the divisions of a council of the realm are essential, are (as was already partly the case in the preceding period) actually withdrawn from the council.

And accordingly the remaining business of the council passed to a council of ministers formed of five, seven, or more principal members of the council as "His Majesty's present government" (cabinet). This method of government, which proceeded from the cabinets of James I. and Charles I., from the cabinets or cabals under Charles II. and James II., proved itself at the commencement of this period to be the only possible form, paying as it did due regard to the predominating party in Parliament. Even that great man William III. was unable to form a coalition government of Whigs and Tories; in the years 1793–96 the dissenting elements silently retired, until an homogeneous Whig cabinet remained. William III. last presided at real deliberations of a council. Men became convinced by practical experience that the new bills and measures to which the council was now confined, could only be laid before Parliament by a united government entertaining the principles it advocated. For this reason no serious attempt was made to return to the old course of business in full sittings of the whole council.* But as nothing has been altered by law in the cases where, according to constitution or law, an *order in council* is requisite, a nominal royal council is held, to which, besides the ministers *pro forma*, some of the members of the council, who are of

* The Act of Settlement attempted once more to restore the original relation by providing, that for the future all matters touching the government of the realm, which would ordinarily be dealt with in the Privy Council according to the laws and customs of the realm, should be there so dealt with and signed by such members of the council as had deliberated upon and consented to them. But this clause was repealed without ever being carried into effect. Men were convinced that it was impracticable. As to the question of the constitutionality of the new mode of business, cf. note at the end of this chapter.

the same mind as the ministry for the time being, are invited. The Privy Council exists now only as a ceremonious sitting of the ministry for the formal ratification and publication of such measures as constitutionally must proceed from the "King in Council."

To this form of State government is attached the predominating influence of Parliament over its members and their policy.

II. To the King in Parliament, therefore, all those powers are transferred which have been lost by the King in council; that is to say, the ministers of the Crown, for the time being, now need the consent of Parliament to a long series of cases which were in former times discharged, as a matter of course, in the council.

This new method of government in England in no way rests upon the normal powers of Parliament, its share in the legislation, its voting of supplies, and its right of controlling the Government as such had been historically developed since the fourteenth century, and fixed by numerous precedents. The dynasties of the Tudors and the Stuarts had nevertheless with this Parliament carried on a monarchical *regîme*, and even after the numerous other limitations imposed under Charles I. and Charles II., a conscientious monarch might have found in the constitution sufficient scope for the exercise of his royal power. It was the new position of the Crown after the Declaration of Rights that perfectly altered the position of the King in council, and the King in Parliament.

The material point lies in the unalterable truth that every political constitution must leave loopholes, which may be described as extraordinary powers, dictatorial powers, latent powers, or the like, but which ever arise anew from the relations of State and society. No human wisdom and foresight can exhaustively circumscribe supreme power in the State by laws or constitutional rules, since the unforeseen needs, and even urgent requirements of society, in every short period demand new measures, for which no sufficient rule has as yet been discovered. In the republic, as in the monarchy,

this dictatorial power must lie on the one side or the other, and the element of power that is taken from the one side must ever be given to the other. Nations which have grown up under a monarchical constitution, and have preserved an intimate relation to their monarchy, reserve these powers to the sovereign in the well-grounded feeling that they rest more securely in an institution which in every personal and family interest is identical with the permanent welfare and prosperity of the country. The English nation, too, has adhered to this monarchical tradition up to the furthest possible limits. Even after very evil experiences in every former century (pp. 117–120) the circle of the latent powers was carefully, hesitatingly, and almost timidly drawn somewhat closer by the legal definition of certain points. It was the unexampled breach of faith, and perversity of a dynasty throughout three successive generations that made the nation waver in this belief, and brought about that change which, under the name of the "glorious revolution," deprived the Crown of every tittle of extraordinary power, because that power had been abused in the most flagrant manner. Every single sentence of the Declaration of Rights was only too much justified by preceding events; but this whole chain of negations since the days of Charles I. leads to a materially altered system of government. The total result of these negations is this, that in every such loophole the powers of the Crown have been expressly taken away, and any attempt made to exercise such appears as an unequivocal case for an impeachment of ministers, and that accordingly every remnant of dictatorial power, which can have any practical importance in a State system, is from that time forth denied to the King.**

** In this decisive point of the so-called parliamentarism there are no "general constitutional truths," but the English nation has even here proceeded slowly and prudently by the light of experiences that are peculiar to England. The Petition of Right, the abolition of the Star Chamber, and the Bill of Rights only lop off single and grossly abused prerogatives. The unconscientious employment of State resources under Charles II. first of all caused that rigorous framing of the clause of application, by which the State government, not only in new, but also in old expenditure (so far as such expenditure has not been provided by law), is subjected to the control of the

Although according to the doctrines of democracy the powers that had thus been taken away ought to have benefited popular liberty, the result was in reality otherwise. Like "the sovereignty of the people" itself, the powers which were taken away from the crown fall into the hands of the dominant class of society, that is, in England, to the now fully developed ruling class in its perfected parliamentary organization. But as the needs of the nation continuously grew out of the existing legislation, as the State, year by year, needed new and extraordinary powers, there was nothing left except that the actual government by the King in council should return to the King in Parliament, return so as year by year to be in a position to cause the necessary means and powers to be voted by Parliament, and thus to enter into a continual confidential relationship to Parliament, that is, into a constant dependence upon it.

But in the eighteenth century there met together a series of circumstances which increased to the utmost extent this dependence of the Government upon the intentions of Parliament. Of these the mention of the following will suffice :—

Whilst the existence of a standing army was dependent in all its needs of resources and legal conditions upon the annual, perfectly free consent of Parliament, no king of England could any longer dispense with this military force,

Lower House. The destructive plans of James II. necessitated the annual sanctioning of the standing army by a mutiny bill. The serious abuses of the administration at last caused the boundary between legislation and administration to be drawn in this way, that everything partaking of the character of an incident money bill, or an encroachment upon property, or an exception from the common law falls within the province of private and local bills, and thus into the sphere of Parliament. But as finally here was not one of the royal rights that had not been abused by the Stuarts, those laws took away the whole of the movable part of the powers of Government which still lay in the King in council. It was only the experiences of three such generations that left behind the conviction that a party government proceeding from the ranks of the ruling class in this country offered more guarantee for a strong and just rule, and less danger to liberty than the old method of government by "King in council." The main point did not consist in formal institutions (which can readily be imitated) but in dynamic forces in the life of the nation. When nations cease to believe in dynasties capable of governing them, disbelief in classes, parties, and party men, capable of doing so, ensues. Whilst all monarchical forms and notions were retained, this belief moved the centre of the State from the council to the House of Commons.

whether for retaining the hold over Ireland, or for maintaining the position of the country in Europe, or yet that of the empire which had spread itself throughout every quarter of the world.

Further, the determination by statute of the whole of the internal administrative law which had gradually increased in an unusual degree, called for new statutes from year to year, and rendered private and local acts necessary for the smallest change in the administrative rules—acts for which the consent of Parliament was requisite, whilst under the normal constitution the ordaining power of the Government, the grant of corporative rights, etc., had sufficed for the current needs.

And if, further, the normal right of the Parliaments to vote taxes was in itself compatible with the maintenance of the royal prerogative, the Continental wars of England, and later the American war, and still more the gigantic struggle with the French Revolution, demanded such unheard-of resources and loans for the State, that even in the former State of the constitution, the monarchy, *pro tempore*, would have come into an unusual state of dependence upon the tax-voting Lower House.

With an empire in such a critical state, it was only too soon perceptible that no royal council was any longer capable of conducting the business of government even for a single year if in antagonism with the Parliament; the resulting—

III. *Relation of the Cabinet to the Parliament* appears for these reasons to be practically necessary as a continuous understanding between the Government for the time being and the "supreme council" of the King in Parliament, which latter from its very nature, could only take an informal confidential shape, so far as the initiative of Government measures was concerned.

This new relation was necessitated by the now unavoidable dependence of every administration upon Parliament, especially in financial matters. Dependence upon Parliament, however, means dependence upon the majority in the Houses, that is, upon the parties for the time being predominating in it.

The more difficult it was to carry through new laws and measures in the great representative body of the realm, the more necessary did it become to undertake the task of carrying them through only by the agency of compact parties, under the advice and co-operation of their most able leaders. In spite of the counter-endeavours of the Crown, the system of party government accordingly came more and more into vogue, and in the continual fresh and more critical situations, there remained at last no choice but to commit the conduct of the affairs of State immediately to the leaders of the most strongly organized party.

The principal danger that attended such party governments in former generations was removed by the present form of administrative law; party government was not developed until the whole of the internal government of the country had been rendered independent of the principles of the dominant party. A Whig and a Tory ministry meant under these conditions only new schemes of bills, new financial measures, and a new line of foreign policy; whilst the judicial, police, financial, military, and ecclesiastical government kept on its established customary course.

Thus, after a century, the place of the "confidential men" in the cabinets of the Stuarts, was taken by the "confidential men" of Parliament in the ministry (the cabinet in the modern sense). In the first generation of the period these were almost entirely nobles of the Upper House, because (in consequence of the Revolution) the dominating influence of great noble families preponderated in the Lower House also. But later, with the increasing competition of the principal debaters in the Lower House, the ruling class upon its broader basis began to be more independent in the money-voting body (as was the case at the time of the Restoration), yet still decisively influenced by old and powerful family connections, such as are generally formed of a fixed and secure class-predominance.

In consequence of the abnormally increased pecuniary needs of the country under George III. the central power in the

State had unmistakably fallen into the Lower House, and for a century past in England the only fear has been not of an abuse of the executive power as against the majority, but of an abuse of the executive power by the majority. The Parliament, and especially the House of Commons, instead of controlling the government of the State, and calling ministers to account, has, in an increasing degree, itself become the ruling body. Its majority no longer merely controls the central government, but even designates the rulers themselves. The legal responsibility retires before a "political" responsibility, that is, before a system of change of ministry dependent on the relations of parties in the Lower House.***

The rapid alternation of these party ministries is not owing to a general "constitutional" principle, but once again to the peculiar position of the British empire. There have been, since the commencement of the parliamentary method of government, only a few epochs, in which a permanent policy has been clearly and fixedly laid down for a government: the epoch of the consolidation of party government under the House of Hanover (Walpole's ministry), and the struggle against the French revolution and the Napoleonic hegemony (Pitt's ministry). But as a rule the position of the British empire throughout the world in its great changes of political and commercial relations to foreign countries, and to the colonies, as well as the very heterogeneous composition of the elements of the empire, necessitated such a frequent change of measures, that the laboriously settled programmes of party leaders and parties could not suffice for the new position of affairs. A short continuance of the ministries in power was accordingly the rule even in the eighteenth century. At every fresh change, however, the experience was repeated that the

*** Herein also the question is one of a change in the relations of power. In the transition to the new method of government impeachments were brought in the first generation after the revolution against the highest servants of the Crown in fifteen cases, but since that time only in a few isolated instances; for since that time, owing to the change in the position of the ministry, a direct abuse of the executive power was almost impossible, and the temptation to such abuse was, in face of a predominating majority in Parliament, very small.

necessary unity of action could only be attained if the ministry in office was composed of men who were agreed in principle as to the chief measures to be adopted by the ministry, and who on these points already commanded, or had the means to command, a majority in both Houses.

In no one of these stages of development did the new method of government depend upon law, but everywhere upon a tacit understanding between the leading statesmen and the opposition, that is, upon the acknowledgment that a government of Great Britain by both Houses of Parliament could only be carried on upon these lines.

NOTE TO CHAPTER LIII.—Whether *government by a cabinet* is *constitutional* or *unconstitutional* has been the subject of political controversies. A careful examination of the question is to be found in Hallam, "Const. Hist.," iii. c. xv. It is true that no English law recognizes a cabinet as a constitutional body, that the members, as members of such cabinet, have no legal rights or duties whatsoever, but solely as members of the Privy Council. The existence of a cabinet is declared by no official act, and its members are not made known to the public, to the authorities in the State, or to Parliament. Blackstone and De Lolme, in their treatises, do not even mention the name "cabinet." It is also true, that the responsibility of the ministers is in some measure relieved by the formlessness of this council of ministers, of whose proceedings no official record is wont to be kept. A legal rule, as to what members, how many members, and with what forms are to be summoned to the council, had never existed, and from the nature of the case could not well be prescribed for a Privy Council of the King. The gradations of the signet, the privy seal, and the great seal necessitate that a person can never be wanting to bear the political responsibility. From the nature of the case the present form of transaction between a ministry and the majorities of two Houses of Parliament as to the initiative in government measures could be as little fixed by law as the forms of negotiation with foreign powers as to alliances and treaties of peace. This form of government would certainly be liable to the severest censures if the exercise of the existing public law (as on the Continent) were dependent in any manner upon such irresponsible meetings of party men. But the entirely different position of the administrative law gives to the question for England a totally different aspect from that for a ministry of the continental states. In spite of the cabinet the government remains a *government by law*, protected against the danger of a party administration. William the Third's resistance at first to the formation of party ministries was very conceivably due to the feelings and the traditions of the monarchy. But he himself in the course of time became convinced that the initiative of new measures in this State could only proceed from party ministries essentially united in their intentions, and with a united scheme of action. He tacitly permitted that only active members and a few other members of their confidence should be summoned *pro forma* to the sittings of the Privy Council, and in like manner the opposition conceded the point. Since that time the practice has been observed which silently excluded the non-confidential members from the deliberations of the council. Once more, at the deathbed of Queen Anne, was the old constitution in some measure revived. Bolingbroke and his adherents in the cabinet had already resolved upon the succession of the Stuarts,

when the Dukes of Argyle and Somerset suddenly made their appearance in the council chamber, took their places, and declared that in view of the dangerous state of the Queen, although not specially summoned, they offered their assistance. They proposed that the royal physicians be heard, upon whose report it was resolved at once to appoint to the office of Lord of the Treasury, and to propose to her Majesty the Duke of Shrewsbury in that capacity. Here was again an open place left for the latent powers of the King in council. On George the First's accession the Privy Council was dissolved, and a new one formed of thirty-three members; but it was again resolved that only eight members should belong to the cabinet (Nottingham, Sunderland, Somers, Halifax, Townshend, Stanhope, the Lord Chancellor, and Marlborough). Since then the number of the nominal members of the council has steadily increased by members of former ministries and the honorary Privy Councillors being habitually continued in the list, and also re-confirmed after the accession of a new sovereign, so that at the present day the list contains more than two hundred persons, among whom a corporate discharge of business would be practically impossible. As to the functions of the Privy Council as they are now, and its divisions, cf. Gneist, "Englisches Verwaltungsrecht," vol. ii. pp. 726–761.

CHAPTER LIV.

The Dissolution of the Great Offices—The Transition to the Modern Ministerial System.

A FURTHER consequence of the transformation of the Privy Council into a movable cabinet was the slowly but steadily progressing absorption of the historical great offices into the *modern system of a ministerial administration*, which becomes more and more bureaucratic in its character, and which, besides the minister, generally receives from the Upper or the Lower House one or two members of Parliament as representatives of the department.

The cabinet was at first formed almost exclusively of members of high nobility. The predominating regard paid to the Upper House was not only rendered requisite by the necessity of its consent to every important measure, but also in an even greater degree by the increased influence of the great families during the revolutionary period, families, themselves the heads of the ruling class, who by their mutual connections and local influence in the county and borough towns, represented the most compact power in the State. Gradually, however, the necessary consideration due to the body of the Lower House asserted itself, and Walpole, who was at first only appointed paymaster-general, obtained after 1721 even the leadership of the cabinet. From that time forth it became the custom to give certain principal debaters a seat in the cabinet, and now a system of the distribution of the offices was formed generally on the following lines :—

The *court offices* are still engrossed by the heads of noble families, or their relations; without any direct share, indeed, in the conduct of business, but with a high honorary rank, considerable salaries, and an assured influence at court.

The *great offices of State* always fall to a great extent to the noble members of the dominant party, who have also influence in Parliament, special regard being paid to the party relations of the Lower House; for this reason, in the eighteenth century, a considerable number of ministerial offices are also given to members of the Lower House, who do not belong to the peerage.

A change of ministry is followed, according to party usage, by changes in the representative court offices, in the under secretaryships, and in some subordinate offices (altogether about half a hundred), whilst in the permanent service, only those offices which become vacant in the course of the period of the administration fall to the patronage of the ministry and its friends.*

The arrangement in detail was carried out according to a gradually established practice by the leader of the party, authorized by the Crown, due regard being naturally paid to the merits of rising members; firstly, to merits in parliamentary debate, and secondarily, also to merits in administration. Since the share of the members of the Lower House has increased, a *homo novus* occurs now and then among the leaders of the party. In order, however, to give greater elasticity and solidarity to the cabinet, an important change was seen to be necessary—viz. the dissolution of the old great offices;—which necessitates once more a reference to the offices of the Privy Council in its old organization.

1. To the *Lord Chancellor* have been delegated numerous

* The formation of the ministerial department is only touched on by Blackstone and his commentators, with relation to the statutes passed with reference to it, which give no picture of the true administration. The central administration was even in the eighteenth century exceedingly complicated. A number of old and comparatively unnecessary offices with high salaries were retained and various new ones created, to draw the members of the Upper and Lower House into the temporary administration and into its interests. To characterize the method of this central administration I add in the following notes certain dates from the middle of the period (1755).

other powers in addition to his original functions. He can, therefore, of course, only personally administer his judicial office in the most important cases. Beside him, the Master of the Rolls holds a separate court as Vice-Chancellor; his Masters in Chancery become counsellors making reports upon the higher judicial and official business. The rest of the enormous mass of business is carried on as usual in permanent offices. The Lord Chancellors, who go out of office with the parties, exercise, as such, no important influence upon the administration, but they have the patronage of a very large number of highly paid offices. (1)

2. The *Lord Treasurer* in the eighteenth century appears as a rule the leading Minister of State. As the Lower House disposes of the national purse, a strong representation of the commoners was necessary in this department. Since George I., therefore, the powers of the Lord Treasurer were made over to a body, consisting of—

(1) A *First Lord Commissioner*, either a peer or a commoner.

(2) *Three or four Junior Lords;* among them, if possible, a Scotch and an Irish member.

(3) The *Chancellor of the Exchequer*, who is the second principal member of the commission, and always a member of the Lower House. This constitution of the central departments as a board is, however, now merely a nucleus for the formation of a number of higher offices. The First Lord has as a rule, as presiding minister, the general control of the administration, without any special connection with the

(1) The department of the Lord Chancellor with its permanent bureaus is scarcely materially altered by a change of party ministries. It is greatly to the honour of the ruling class, and of the legal profession, that this great Chancellor has always preserved the spirit of judicial administration. Out of regard to the Upper House, in which he presides, the Lord Chancellor is now always raised to the hereditary peerage. At times this office also is put into commission, and then a commissionary speaker of the Upper House is appointed. The great "Court of the Lord Chancellor" consisted in 1755 of the Lord Chancellor, the Earl of Hardwicke (at a salary of £2100 and fees; together more than £7000), the Master of the Rolls, twelve masters in Chancery, a principal registrar, the Duke of St. Albans, with two deputies, the clerk of the hanaper (the Duke of Chandos) and deputies, etc. (more than one hundred officials in permanent service). The Duchy of Lancaster contains an imitation of the Chancery on a small scale, altogether about thirty sinecures.

financial department. The Junior Lords are confidential men selected from Parliament, who confine themselves to counter-signing important decrees. The head of the finance department is the Chancellor of the Exchequer alone. If the Premier (First Lord of the Treasury) is a member of the Lower House, he can be at the same time Chancellor of the Exchequer; if he is a peer, the offices are always distinct.(2)

3. The *Lord President of the Council* loses with the council his former importance. His office is an honorary one, like that of a minister without a portfolio, and of itself is of no decisive influence upon State business.

4. The *Lord Privy Seal* seals the orders or warrants for the great seal, and accordingly is a controller of the ministerial course of business, without a separate administrative department.

5. The *Lord Chamberlain's* functions are those of superintendent and censor of theatres.

6. The office of *Lord High Constable* has ceased to exist.

7. The *Earl Marshal* is head of the Herald's Office.

8. The office of the *Lord High Admiral* has resigned its judicial business to the Court of Admiralty; for the admini-

(2) The department of the Treasury includes, as a rule, the Prime Minister, First Lord of the Treasury, and the Chancellor of the Exchequer, in the capacity of minister of finance. The old Exchequer still continues as a very cumbrous general financial control with numerous offices, which are now in great measure sinecures for members of Parliament, and in part also are feudal hereditary offices. In the year 1755 the Treasury consisted of a *First Lord*, the Duke of Newcastle (£8000), *three Junior Lords* (the Earl of Darlington, Viscount Dupplin, R. Nugent), and the *Chancellor of the Exchequer* (Legge). The Exchequer consisted of the *auditor* (the Earl of Lincoln), the *clerk of the pells* (Sir Edward Walpole), the *four tellers* (the Earl of Macclesfield, Hon. T. Townshend, Viscount Royston, and H. Walpole), each with a deputy; the *two chamberlains*, Sir S. Stewart, and Sir W. Ashburnham, each with a deputy; several officers of the Exchequer department, the *usher of the Exchequer* (H. Walpole), paymasters, and so on. In the year 1780 the auditor of the Exchequer received as pay £14,060, each of the four tellers £7038, the clerk of the pells £7597. To the account side belong twelve for the most part very ancient offices. Still more numerous are the independently formed under-departments of the Treasury; the upper custom office, the general excise office, the salt commission, stamp office, land-tax commission, general post-office, and mint. Certain heads of the under departments (such as the department of the demesnes and forests, and the board of works) received occasionally a seat in the cabinet. Including the under departments, the whole staff was so enormous, that the Treasury alone included about half of the whole civil service.

strative control, an Admiralty Office has been formed, consisting of a First Lord of the Admiralty, and six Junior Lords with a deliberative vote; all of whom go out of office with the ministry. (3)

9, 10. The *Lord High Steward* as active chief, and the *Lord Chamberlain* for the court department of the wardrobe, chaplains, physicians, etc., belong entirely to the royal household.

11. The *Ordnance Office* has consisted unchanged since Charles the Second's time, of the Master of the Ordnance, and five members, usually of Parliament, all changing with the ministry. (4)

Still retaining their names, titles, pay and fees, four chief departments of State have sprung from the old great offices.

(1) *A principal Department of State and Finance.*

(2) *A Department of the Lord Chancellor.*

(3) *An Admiralty.*

(4) *An Ordnance Department.*

To these departments are added others, which are formed by dividing the department of the Secretary of State. From the original position of a cabinet-councillor, the Secretary of State came to conduct correspondence in the name of the King with the local boards touching measures of internal government and police, and to correspond with foreign envoys and foreign cabinets,—functions which, in consequence of the altered position of the cabinet, were inseparable from parlia-

(3) The Admiralty Department consisted in 1755 of seven lords commissioners (£1000). To this department belongs a list of six admirals, nine vice-admirals, six rear-admirals, and 237 captains. The Navy Commission consisted of a comptroller of the navy, nine higher officials, and thirteen local boards for the arsenals; the victualling department of the navy consisted of seven commissioners, the treasurer of the navy, etc.

(4) The department of Master of the Ordnance existed formerly under the Duke of Marlborough in a manner that at once gives an idea of the Whig administration of those times. The duke was Master of the Ordnance with £3000 salary, £1825 travelling expenses, £1000 representation money, and £2000 as colonel of the foot guards (besides £7000 as plenipotentiary of the Netherlands, £10,000 as commander of two armies, £10,000 as commander of the Dutch troops, £15,000 percentage from the hired soldiery, £5000 pension; the Duchess held four court offices and a pension together amounting to £9500). The military branch of the ordnance office includes a chief of the engineers, eight directors, etc., and the whole artillery.

mentary party government. Immediately after the Revolution, the Secretaryship of State, as an important office for a high peer belonging to the dominant party, was divided between a first and second secretary. Under George I. the first Secretary of State, Lord Townshend, was even regarded as Prime Minister. After the union with Scotland, a third Secretary of State was appointed, for Scottish affairs; but his office was abolished after 1746. In the year 1768 a third Secretary of State was created for the American colonies, but his office was abolished in 1781. Meanwhile, by arrangement between the two chief Secretaries of State, a division of the business was effected, into a north and south department. In the year 1781 a systematic division into a home department and a foreign department was at last effected. In the year 1794 the relations with France necessitated again the appointment of a third Secretary of State, for war, to whom in 1801 was entrusted also the administration of the colonies. Accordingly at the close of the period, out of the Secretaryship of State there had proceeded three further chief principal secretaryships.

(5) *A Principal Secretary of State for the Home Department.* (5)

(6) *A Principal Secretary of State for the Foreign Department,* to whom the diplomatic and consular system was subordinated. (6)

(5) About the middle of the eighteenth century the Secretaryship of State still forms a whole in the sense that the geographical division predominates, and the division of business is subordinate. To the northern department belong nine envoys and ministers plenipotentiary, to the southern department a like number, added to these twenty-five consuls, twenty agents for the colonies, etc. The pay of a Secretary of State was in 1795 fixed at £6000, whilst under Elizabeth it had only amounted to £100 with free table. Since the systematic separation of the Secretaryship of State for the Home Department and for Foreign Affairs, since 1782, the home department consists in a very simple form of the Principal Secretary, two under Secretaries of State and a moderate staff of clerks. Connected with it is a series of functions concerning the administration of penal justice, which with us in Germany are assigned to the ministry of justice, whilst in England the office of Lord Chancellor is essentially confined to the province of civil justice. By being combined with the home department, criminal prosecutions and the carrying out of the sentence of the law especially gained a more elastic form.

(6) The foreign department consisted since 1782 likewise of one Principal Secretary, two under secretaries, etc.

(7) *A Principal Secretary of State for War and the Colonies* (since 1816 principally confined to the administration of the Colonies). (7)

Every secretary of State has as a rule two secretaries, who here receive the title of *under secretary*. But still the secretaries of State in the eye of the law are only considered as one person; the distribution of business among them is, accordingly, a matter of administrative arrangement.

In the nineteenth century, I may say at once, this process has been continued by the further division of the Secretaryship of State, and by the formation of central boards for new branches of a newly organized administration by parliamentary legislation (parliamentary boards). There have been added in particular—

(8) *A Secretary for War* who combines the old ordnance office and sundry under departments in a single ministerial department.

(9) *A Secretary of State* for India, after the older controlling office for the government of India had developed into a bureaucratic ministerial department.

(10) *A Chief Secretary of State for Ireland.*

From an extension of the poor office in our own day a central board has proceeded for the modern system of local administration by district boards (*Local Government Board*). Under the name of *committees of the Privy Council*, a *Minister for Trade* and a *Minister of National Education* have been

(7) The department of Secretary for the Colonies and War was so constituted, that sometimes the colonies were the chief, and the war administration the secondary department, and sometimes *vice versâ*. To the colonial department belonged, in 1755, an Auditor-General of the Plantations (H. Walpole), twenty-one governors with vice-governors, commanding officers, judges, and attornies-general. The paid army was in 1755 under two civil chiefs of second grade, the Secretary at War, and the Paymaster-General. The Secretary at War (Henry Fox), and the Paymaster-General (W. Pitt), form together the general department of war. Here as in all administrations of public money the salaries were exceedingly high, and were further increased by the balances which the officials in consequence of long delay in payments often retained in their hands for years and could make use of. The Paymaster-General, for instance, in 1781 had £3061 salary, but his balances for the twelve preceding years amounted to £558,898. The chief clerk had £460, which by fees rose to £7159. A survey for this time is given by Geisler, "Geschichte Grossbrittanischen der Kriegsmacht" (1784).

created. All new formations, however, follow the bureaucratic system of departments. According to the arrangement of the cabinet for the time being, moreover, the Postmaster-General, the Paymaster-General, the Chancellor of the Duchy of Lancaster, and other officials of the second order can be favoured with a seat in the cabinet, and be also made members of the cabinet without portfolios, so that in the last century the number of members with a voice in the cabinet fluctuates between 10 and 17, and as a rule between 12 and 15. As well with regard to an easier arrangement in distributing the places in the ministry, as also with regard to the necessity of giving an elastic form to the ministerial administration in an era of reforms, the determining of the competence of the central boards by law has been avoided as much as possible, the distribution of business among all "secretaries of State" being rather regarded as a matter purely of internal administration; and in other respects also a definition of the department by the legislature has been avoided as much as possible.**

** This question of constitutional law, which has been the object of much discussion in Germany, has been specially treated by Gneist, "Gesetz und Budget" (1879. Abhandlung, ii.).

CHAPTER LV.

The Formation of Parliamentary Parties.

As the dependence of the central Government upon Parliament has led in logical consistency to changes of ministries, so also the ascendancy of the Lower House led to the fixed organization of two parliamentary parties, which have since the beginning of this epoch alternately taken the reins of Government, the coalition ministries formed of both parties each time representing only a short period.

This party formation is the expression of the fixed political and social order, as it had now become perfected. It presupposes a constitution recognized by all parties, the uncontested position of a ruling class, and the internal harmony in the intermediate links of local Government, as well as the blending of the executive power with an ecclesiastical system recognized as a national Church. So soon as this unity in head and limbs has been attained, the fundamental conceptions of the State appear in the simplest possible form as two parties.

The philosophical ideals of a perfect political system, which without party strife shall unite together the natural diversities of a popular will to a one-minded and undivided will—be it republic or monarchy, democracy or aristocracy—are based on a misconception of human nature. Man, as a sentient animal, with his various necessities, is at all times and in all places dependent upon the outward goods of nature, the acquisition, possession, and enjoyment of which invariably forges a chain of relations of dependence, which in innumerable combinations form the firm strata of society, in which the

individual with his family, and every wider community finds itself planted and bound in perpetual conflict with the interests of others. In this perpetual struggle for existence, in the constant endeavour to possess and to enjoy, to exclude others from this possession and enjoyment, and in the constant interest in getting rid of or diminishing personal dependence, and in consolidating and extending the dependence of others, every nation attains and asserts the greatest possible measure of human liberty only in subordination to the absolute commands of a moral law in the Church and of a fixed external legal order in the State.

After bitter struggles the English nation had at last succeeded in reconciling the violent antagonism between society, State, and Church by internal perfection of structural cohesion. But that which had been thus united was and remained a twofold organism, built up of political and social elements, in the whole as in part, and therefore in as constant movement as the life of the individual, and on that very account the subject of a double conception and double direction of effort, according as the State is looked at from above or from below, according as the necessary unity of the political will, or the free will of the individual is taken as the starting point, according as the sovereign right of the supreme ruler, or the rights and liberties of the people are regarded as the highest principle of the whole. In the Long Parliament of Charles II. the great parties had become definitely distinct. The web of religious and political views, obscure in the civil wars and in the time of the Republic, has now become disentangled into two fundamental systems, which since 1680 find their popular expression in the party names of Whigs and Tories. As since the days of Magna Charta, with the development of self-government, of the Great Council and of Parliaments, the English conception of domestic policy is characterized by practically grappling with its immediate tasks, so after two generations of conflict between the extremes of Puritan and High Church theories, the predominating conception returned to that realistic tendency,

which conceives of and formulates political questions purely according to the experiences of its own past.

The united gentry had overcome James II. The constitutions of Parliament, the county, and the corporations, as well as the whole legal system of the country, was declared to be inviolable by royal prerogative. The mutuality of the relation of rights and duties between the people and the Crown had, owing to the open breach of it on one side, again come to be clearly understood, and enforced as an "original contract" between King and people. The inviolability of the popular rights had even been sanctioned by the expulsion of a dynasty, and the legality of this event had become a necessary condition of the existing constitution. In the eyes of the one party this appeared to be the highest principle of civil liberty in the State:—the *right of resistance* to the Crown in the event of unconstitutional encroachments; *resistance*—the watchword of the Whigs.

On the other hand, it is after all only the ruling class that actually exercises political rights. It controls the central administration through Parliament and the county through the office of justice of the peace. It needs accordingly a sanctioning authority in order to command the obedience of the lower classes. The million does not regard it as a ruler in its own right; it merely exercises its powers in the name of the King in Parliament and the King in council. Only as far as the reigning class itself obeys a moral law, which is incorporated for all classes alike in the Church of England, is a moral use of its power guaranteed; as on the other side for the mass of the people obedience arises not so much from a commandment of reason as from a feeling of duty and belief. In the eyes of the other party the highest principle was "*Throne and Altar*," or rather, with an intentional reversion of the words, *Church and Crown*—the watchword of the Tories.*

* During the civil war Cavaliers and Roundheads were distinguished; in the movements of the Restoration, Royalists and Presbyterians, the court and country party; at the time of the Exclusion Bill Petitioners and Abhorrers; and immediately following these, Whigs and Tories, which were first used as terms of contempt at the elections of 1680.

Both party principles are reflexes of one and the same condition of things, linked together like the actual State and society in England. They are the conflicting creeds of the Middle Ages, which survive in a higher development in these parties: in the Tories the idea, inherited from the Church, of the necessity of a firmly established permanent executive power as the basis of civil order; in the Whigs the confederate ideas of the Germanic community as the basis of constitutional liberties. The political ideas which in the Middle Ages were divided between *imperium* and *sacerdotium* have now become fundamental conceptions within the political unity of the State. Both parties accordingly recognize each other, however far their ideas concerning the development of the constitution and the policy of the administration may differ.

Under the names of Whigs and Tories, throughout the whole of the eighteenth century, the wealthy classes gave the Government its policy—closely bound up with hereditary family traditions and the social interests of the gentry. The battle cries of the parties were at the commencement of the century still resistance and non-resistance; then the Stuarts and Hanover, then the American war, and then the French revolution. During the greater part of the century the Whig Government, with its recollections of the encroachments of the Crown, was on the whole in an ascendency; during the last decades of that century, when the obedience of the lower classes was distrusted, the Tory Government decidedly predominated. But both parties are primarily factors of the ruling class, with great noble families at their heads. In the parliamentary elections a fluctuating majority is seen in the wider circles of the gentry and the enfranchised middle classes, which is not accidental, but in visible connection with necessary movements of the legislation, and the financial and foreign policy. Naturally, the views of the individual regarding the State are determined by individual experiences of life and by the general tendencies of the human mind; in this sense a Whig or Tory tendency may be found in every social group

and in every individual. England's past has displayed in this matter a two-sided view, in exceedingly rich and vivid pictures, in which sometimes fear of "unbridled licence" in the people, and sometimes fear of "encroachments" of the Government obtained the upper hand.

The reasons urged in support of these theories are in harmony with the state of culture of the times. The theological reasons, from the standpoint of the Episcopalians and the Puritans, had in the course of the civil war and the Republic become much secularized. What still remained of them after the Restoration is less an expression of religious conviction, than the affected party language of a political clergy. The theory then prevailing derives the system of political government from the nature of mankind. On the one side, from the nature of freewill, was evolved the theory of "State contract," which in Locke's system is an abstraction of the English county and parliamentary constitution; on the other side a system of inherited "authority" is derived from the feeling of dependence and from the necessity of government which inevitably results from the nature of society. The influence of wealth upon the form of the State had not as yet in England attained to a systematic conception, but still lived in the consciousness of the nation as an important factor, after the experiences of the constitutional struggles. In Hobbes, the fundamental conception is clearly abstracted from the impressions of the civil war. This empirically national tendency has, since the seventeenth century, given both parties an historical point of view, the standard of which on the one side was the sovereign power of the Norman kings, and on the other the traditional liberty of the Saxon communities. But the enormous number of precedents was subjected to such a various classification according to previously adopted points of view, that even history, under the hands of partizans, changed its form, and the experiences of the past were no sure guide for the present.**

** For the theological reasons I may refer to Chap. xxxv. The eighteenth century stands essentially upon rationalistic ground. The theories then pre-

Though the leading spirits both in Church and State regularly move in one party direction, yet the policy of both parties was limited by the administration of justice, and its further development into jurisprudence. The conservative feature of the constitution of Parliament, which accumulates customary law and statutes from generation to generation, and makes all changes in them dependent upon the agreement of all three factors of the legislature, had left behind a positive system of legal principles, which in definiteness left much, in specialty little, to be desired. Upon this given basis both parties found their hold. Both alike condemned the Stuarts' treatment of the tribunals, and by tacit agreement put an end to the abuse of the judicial power to serve party ends. With this century there begins for England a new era of judicial purity. A feeling engendered of bitter experience withheld the parties from meddling with the time-honoured constitution of the tribunals, and the legal institutions. In them was found the buttress of public and private law, as

valent basing government upon the nature of the human will, do not so entirely in England, as on the Continent, overlook the fact that the State is no product of the abstract will, but that it rests like the individual man upon the basis of property and labour, and upon the needs, interests, classes, and ranks thereby produced. For this reason, in the seventeenth century, the historical method began. In this direction the works of Selden, Prynne, Cotton, and others are of lasting value, but they hold too much to the external appearance of the precedents. The one-sided deductions which (for instance) Brady and his school drew from true facts, made it a national duty to argue away the whole form of the Norman State by assigning to old indefinite expressions the later parliamentary meaning, taking certain maxims from the connection subsisting between various generations, and binding them together by the logic of later jurisprudence. This picture, devoid as it was of perspective, was called in England the "history of law." It has found for the Lower as well as for the Upper House a highly respectable genealogical tree; its pious forgeries reach back even into the thirteenth century (*modus tenendi parliamentum*). "Thus, in our country," says Macaulay, "the dearest interests of parties have frequently been staked on the results of the researches of antiquaries. The inevitable consequence was, that our antiquaries conducted their researches in the spirit of partisans. It is therefore not surprising that those who have written concerning the limits of prerogative and liberty in the old polity of England should have generally shown the temper, not of judges, but of angry and uncandid advocates. . . . With such feelings, both parties looked into the chronicles of the Middle Ages. Both readily found what they sought, and both obstinately refused to see anything but what they sought" ("History of England," c. I.). A principal magazine for these arguments is Tyrrell, *Bibliotheca Juridica*, 1694. As to the English party literature generally, cf. R. v. Mohl, "Litteratur der Staats-Wissenschaften," vol. ii. pp. 38, *seq.*

well as a judicial firmness of character, which among the conflicts of the day established and developed the existing law. The commentators upon English law endeavour to shape their matter in some measure according to principal points of view and maxims. From laws, precedents, and leading judgments there becomes formed a continually progressing, judge-made law, similarly to the manner in which the Roman jurisprudence developed its law from the *ratio* and from an originally scanty legislation. A systematic support was finally given to it by Blackstone's celebrated commentaries.*** The chief merits of this work are impartiality and perspicuous and pleasing description, together with a wonderful optimism of feeling which could, in a time of the open corruption of a Whig administration, form an ideal of the English constitution. Although the real practical basis of the English political life, self-government and the administrative organism are only fragmentarily treated, yet this treatise has, owing to its connection with a classical education and Montesquieu's division of powers, entirely influenced continental ideas of the English constitution down to the present day.

*** The party colouring of the historical, philosophical, and religious conception gave the legal profession, which was kept distinct from both universities, its high importance for the public law. But as the decisions and grounds for the decisions of the English *juris auctores* in their great collections were inaccessible to the Continent, the systematic compilation in Blackstone became almost the only source of knowledge for the European world. Its merits do not lie in comprehensive historical investigation, nor in depth of philosophic theories, but in the impartiality which pays due deference to the constitutional advocates of both parties, and after weighing the *pros* and *cons*, the facts and the reasons, the precedents of ancient times, the Middle Ages, and modern times, draws conclusions according to the custom of the judicial office. The clearness and elegance of the treatise have made Blackstone the centre of what is called English constitutional law. And the modern science of constitutional law has not advanced in England much beyond commentaries on Blackstone.

CHAPTER LVI.

Theory and Practice of Parliamentary Party Government.

Party ideals, like those of a concentrated popular will, cannot be realized without a constant appeal to social forces and interests, which are at all times difficult to concentrate upon one aim. For every important measure, necessitated by the position of State or society, the cabinet needs in this constitution the consent of a majority in both Houses of Parliament, which involves a very high degree of self-control, subordination, and discipline, such as in Parliaments can only be acquired by a continuous discharge of the *ardua negotia regni*, and in the constituencies only by firm cohesion and by similarity of bases, as well as by the habit of common activity.

Every revolution, even the most justifiable and successful one, is a misfortune for a nation, because it shakes those cohesions and habits to their foundation, partially breaks through them, and occasions a storm of all the elements of social contrasts, the waves of which are scarcely calmed down in a single generation. It was a blessing for the nation that the greatest statesman of the time, William III., with the cool glance of a helmsman, steered the tempest-tossed barque of the State for half a generation. During this critical time the Crown still retained in its hand the initiative and the appointment of the ministers, even in spite of six changes of the cabinet, and an enforced regard to the party combinations in the Upper and Lower House. The great Prince of Orange did not succeed in gaining the thanks

and acknowledgments of the parties, the sympathies of the nation, or even any appreciation of his policy.

With William's death this leadership ceases, and the return of the sway of the noble parties, which was so disastrous in former centuries, is now combined with the party system of the financially powerful Lower House. Under the vacillating Anne, party policy was so closely bound up with the interests of families and factions, that the constitutional ideals of both parties are sought for in vain. Upon the banner of the Whigs is emblazoned: Septennial Parliaments; the French war; the old commercial policy; no Popery. Upon the Tory banner: Triennial Parliaments; opposition to the French war, to protective duties, and limitations of trade; union with the Catholic faction in England, and with the national party in Ireland. Even the glory of the English arms is only reckoned as a party factor. The leading men are either without moral worth, or their great qualities are blended with meanness, as in the case of Marlborough. At Anne's death the return of the Stuarts seems almost to turn upon an intrigue of the nobility, which was frustrated by a counter-intrigue.

It was only on the accession of the House of Hanover (1714) that the permanent ascendency of the great noble party, which had stood at the head of the resistance to the Stuarts, was secured. And with the consciousness of its decided superiority, the great noble league also regained a feeling of responsibility for the welfare of the country. But to gain the Parliamentary majorities necessary for the conduct of the political Government, the noble league had no longer at its command the old resources and ways of the monarchy, but only a shrewdly calculated exercise of the ministerial patronage of honours and offices, a careful utilization of personal and local interests, together with a strict party discipline for gaining and maintaining majorities. It was not easy to accustom English politicians, whose feeling of individual independence, and whose obstinacy are not less decided than those of the Germans, to that strict subordin-

ation under a party rule which is the essential condition of a parliamentary party Government. It required more than a whole generation, before the schooling of parliamentary parties under the discipline of an acknowledged leader was complete. The extension of the periods for which Parliaments were summoned from three to seven years by the Septennial Act (1 George I. ch. 2, c. 38), was very conducive to this end. Down to the ministry of the younger Pitt, intrigue and desertion is an only too frequent phenomenon in the party. But the actual necessity for a concentrated will in the conduct of the State, and the charm of political power at last solved this problem also.*

This Whig Government continued for nearly fifty years, and by systematically availing itself of all the powers of Government, succeeded in mastering the Tory opposition, consisting of country squires and clergy. But in doing this it certainly lost the ideal foundation of its party policy, now that its principle of "resistance" had lost its object. It is now nothing more than a combination of great noble families, which by agreement with the borough interests maintains a majority in the Lower House; but on that very account gradually splits up into intriguing coteries. The nation, however, accustoms itself to the ways of a party Government. Walpole's administration again strives for the systematic advancement of material interests, and deserves well of the

* With every change of situation the experience was repeated, that within this fixed rigid framework of public law a cabinet of *solidarity*, in close connection with both Houses of Parliament, had become an absolute necessity, because without it any movement in the political body did not appear possible. The tremendous difficulty of gaining for every important measure the consent of many hundred intelligent, influential, and independent men, causes a clumsiness in a government by party, which only English energy, with its party discipline in the form of a cabinet has, in the course of two generations, overcome. Real progress, even in this more practicable form, is difficult enough, even at the present day, and every initiated person knows what difficulties, now as formerly, the apparently omnipotent Prime Minister has to overcome, not only above and below, but also in the circle of his own colleagues, before he succeeds in inducing a cabinet of a dozen capable men, every one of whom has his own system, his own past, and his own future, to unite in adopting resolutions. That eternal problem, how in a free State to blend the diversities of individual wills together into one united and single will of the State, is concentrated in an English cabinet as in a focus.

country, whose commerce, finances, and general prosperity it promotes. But in all personal relations intrigue and a commercial spirit predominated. The method of bribery in Parliament first of all showed itself in the form of "retaining fees" for the Scotch members, and developed itself further into direct money payments, pensions, and sinecures. The rule of George I. and George II. allowed this manipulation of parliamentary majorities to proceed. Their German electorate was more intelligible to both than were the mysteries of the English Parliament. George I. did not even know the English language. Their civil list was punctually paid; the Whig Government did not even disdain to pay every mistress of George I. £10,000. The extension of the duration of Parliament from three to seven years, the immoderate personal pretensions of the members of Parliament, and the overgrowth of conflicts of privilege, as at the time of the Restoration are all characteristic features of this period of development of party government. In the interior of the country, throughout all these changes, the local government pursued a steady course, and this habit of common action begins again to react upon the Parliament.

George III. (1760–1820) ascended the throne with the firm resolve to break down the party government he found existing, and to assert the personal will of the monarch in the State. But in order to defy a party government which had consolidated itself for two generations, there would have been requisite a commanding intellect, the solution of a great national task, and a judicious choice of prominent men, who were really fitted for the leading offices in Parliament. But the youthful monarch failed during the first twenty years of these attempts, quite as much in measures as in the lack of competent men. George III. certainly succeeded, by his personal adherents (the King's friends), in perpetually thwarting the sway of the parliamentary parties, and more than once, though with the best intentions, he injured the true interests of the State. But all the less did he succeed in defeating the established power of the noble parties; ill-

timed endeavours of this kind even compelled him to accept for the first time a united ministry (1782) against his openly declared will.

But, nevertheless, the King had again become a positive factor in the State-system, and regained influence when, in conjunction with the regenerated parties, he began to pursue popular aims. Such tasks had again arisen for the English Government with the war against the American colonies; the highest tasks arose in the gigantic struggle against the French revolution. It was certainly only after the Crown entered once more into the struggle of the parties that the epoch of great statesmen begins, with whose names modern European opinion of the English constitution is intimately bound up. Even in this time the position of the parties remains a labyrinth of personal relations, and the system of corruption spreads, after the accession of George III., from the Lower House to the small boroughs. The real task of George the Third's life, as that of his statesmen, was only found in the great struggle against France, the social revolution in which country was diametrically opposed to the inmost nature of English society. In the period of this struggle Pitt's commanding intellect was at the head of a well-disciplined party, which, hand in hand with the King and the masses of the people, wielded a safe majority in the Lower House and an enormous political power until the national cause triumphed (1815).

There is certainly a curious contradiction in the fact that every new contribution to historical literature and memoirs brings to light new weaknesses in the times and in the men who adorn the acknowledged zenith of parliamentary government. But the reasons for this phenomenon are invariably contained in the nature of a self-governing society, and are accordingly repeated in every analogous period, and in the period of glory in every republic. The party government then in power, which required for every important act of Government the support of social forces, found itself face to face with a new and serious necessity. Now that it was no

longer practicable, in view of the powerful influence of the press, to buy the votes of individual members of Parliament, the parties at this time began to gain and to maintain the constituencies by artificial means. The immediately effectual means, that of employing the police-power and the "superintending power of the State" to promote ministerial elections, of which the constitutional ministers of the Continent soon learnt to make use in order to defend their position, was denied to England. As the system of self-government, and the administrative jurisdiction did not permit of any threats of "disadvantages" to influence the elections in favour of the Government, there remained nothing left but the promise of "advantages"—a kind of bribery—certainly not for private interest, but for the purpose of carrying through a system of government considered to be right. A broad field for this was furnished by the small boroughs and Scotch constituencies, so that at the turning-point of the century the disbursements of the "borough-mongers" were reckoned at £1,200,000, in which system the rich self-made "nabobs" of the citizen-class vied with the country gentry. It is this system which disfigures the most glorious epoch of parliamentary government, and ever afresh brings before our eyes the fact that the real Parliament was in no wise a mirror of virtue, and that the mere history of the party systems, party men, and their great mass of family connections, with all human weaknesses and jealousies, scarcely allows of the greatness of this political system in its full development being understood or even dreamt of. And yet it has probably never been different in any free constitution. Rest and progress in the State alike demand in such a constitution a spontaneous party activity when in conflict with the antagonistic party, which brings society in wider and wider spheres into a state of discomfort, or else excites its deepest passions. This continual bringing together of a number of individuals to a unity of will, necessitates the employment of artificial party means, the subordination of the individual will to the iron discipline of party, and so much resignation on the part of the individual, so

many feelings of vexation, and so much self-denial on the one side, and disappointment on the other, that the period of a free State is never a time of comfort and contentment for society. The mutual public criticism of party views may lead to undivided blame, but never to undivided recognition, for the test of character to which every person in a party-conflict is subjected is passed even by the best men of the time only according to the measure of human faculty. Such a system of government in its final result cannot be estimated by the position of a party government and party men at any given moment, but must be studied by the light of the whole movement of the State, of the whole character of the people, and of the whole result.

This external result is certainly a magnificent development of the British power in all quarters of the globe, a progressive expansion of its warlike and commercial power in close bond of union with each other. And in its internal character also this period has in the main, as regards steadfastness and fidelity towards recognized truths, done more than other times and nations. On that very account the qualities of the ἀρχαῖος πλοῦτος and the ἀρχαῖα ἀρετή come unmistakably into the foreground. It is a thorough aristocratic government with its bright and its dark sides, certainly the best aristocratic government in the history of mankind, though in no way capable of application to other nations, in the absence of the previous conditions upon which it arose.

Note to Chapter LVI.—*The Continental views concerning the system of parliamentary government* were always influenced by the state of things existing in those times, and among those nations that turned their attention to it; accordingly they form a history of their own. We must not only test in historians what they have found, but still more what they have sought. "There was a period which regarded England as the pattern of a political State, in whose constitutional forms the whole secret of its liberty and its fortune was said to lie. There came another period, which discovered nothing but defects in the same institutions, defects to which the other had been blind, and doubted altogether a liberty, that was so difficult to explain. The exaggerated admiration for England was followed by an equally exaggerated depreciation of it. The good had been sought where it was not to be found, and it was thought proper to deny its existence because it was not found where it had been erroneously sought. Curiously enough, it was a foreigner, De Lolme, who was the first to call the attention of the English to the secret charms and benefits of their constitution" (Jochmann's "Reliquien," ii. 134).

Not so much in the period of great

parties and party leaders, as in a much less brilliant time, did the English constitution produce ineffaceable impressions upon the Continent, which were visible even before the middle of the much-agitated eighteenth century. There lie behind these the first movements of the upper classes to gain an active share in State government; and most of all, where the bureaucracy had established itself earliest and in the most rigid form—in France. The verdict upon England was thus of necessity one-sided, like every view which seeks something that is wanting. Here was found a powerful and respected nobility, elected Parliaments, liberty in the commune, liberty of speech, and liberty of the press. These were the *desiderata*. The real origin of the English constitution and its social bases were unknown to Montesquieu. But he supplied the deficiencies with brilliant versatility and French perspicuity, from antique and mediæval ideas, building them up to a "system of the division and equipoise of powers," which through Blackstone and De Lolme became traditional in England. Nobles and prelates, knighthood and cities, all the bases of a Parliament had been present with us also in the Middle Ages —and in more grandeur than in England. The constitutions of the estates of the realm were based upon an uncontested right to vote taxes and to share in the administration. The division of the powers could readily be effected. Why should that be denied to the Continent, which in England so honourably existed together with the legal security and the prosperity of the country? In spite of numerous disappointments, since then the feeling has been left behind in the Germanic and Roman races of Europe, that no content can return and no progress be made towards attaining a vigorous political system, without analogous institutions. What is easiest to borrow is certainly the election of a popular representation upon a broad or the broadest basis with absolute powers over the finances of the State, and in consequence over the choice of ministers. But that is only an imitation of the external shell, without the internal essence, as the nations of South Europe have experienced to the detriment of their administration and the well-being of their people; whilst Germany, through its monarchical form of government and the deeper struggle of party contrasts, was compelled to lay the bases in a manner in some degree satisfactory, before it passed over to the forms of the parliamentary system.

A comparatively impartial picture of party governments as they really were in the first half of the century, is given in Hallam's "Constitutional Hist.," iii. cc. 15, 16; whilst Macaulay's brilliant description only brings us down to the beginning of the eighteenth century. From George III. onward, the relation of party governments to the Crown has been thoroughly treated by May, "Const. Hist.," i. cc. 1, 2, 7, 8, with most praiseworthy objectivity. From the Tory standpoint the subject has been dealt with in Lord Mahon's "History;" more impartially in W. Massey's "History of England under George III." Cf. von Norden, "Die Parliamentarische Parteiregierung in England," in von Sybel's "Historische Zeitschrift," xiv. 45–118. For a verdict upon the real state of things there is needed, at all events, a knowledge of the historical writings of both sides, and, so far as possible, of the memoirs and special literature. To the special history of the parties belong from former times: Thomas Somerville, "History of Political Transactions from the Restoration to the Death of William III.," London, 1794. Wingrove Cooke, "History of Party, from 1666–1832," 3 vols., 1836–1837 (Whig). C. Lewis, "Essays on Administrations of Great Britain," 1783–1830, by Head, London, 1864. Medyn, "Chiefs of Parties," London, 1859, 2 vols. Cf. also Fischel, "Die Englische Verfassung," vii. c. 12. Bucher, "Der Parliamentarismus," second edition, 1881.

CHAPTER LVII.

The Parliaments of the Nineteenth Century down to the First Reform Bill (1832).

The attempt to sum up the total results of the thousand years' political development of the English nation is a task of such magnitude, that the English historians themselves shrink from undertaking it. So far as it can be solved, it must be combined with a full description of the social, political, and ecclesiastical conditions of the present day. But what the present work may attempt at the close, is to give prominence to leading points of view marking the transition to the nineteenth century—the century of *social reform* and *reform bills*, which, as it has not yet run its course, does not come within the scope of an historical work.

During the eighteenth century, England, as the only great free State, stood alone amongst the other great European States, in which the height of absolutism and the *ancien régime* held full sway. Excepting sundry small States, among the peoples of the old world, the English was the only nation that, after a long and honest fight, had victoriously triumphed over political and ecclesiastical absolutism and Cæsaro-papism. It appeared as though this Germanic people was destined by Providence to preserve to Europe during the eighteenth century the picture of a free State, in order that in the nineteenth century it might be made the common property of the European world.

In it social and personal liberty were not, as in the ancient State, sacrificed to political liberty. For the first time in history there was here realized in a great State the full meaning of liberty:

Social liberty, that is, the legal faculty for the lowest to rise, by merits and talent, to possessions and honour;

Personal liberty, which, with the full power of the executive, maintains respect for the person and property of the individual;

Political liberty, enabling the people to impose upon itself its own laws, and to execute them itself in free self-government.

Nations cannot but desire liberty, thus defined, in its entirety. What may appear to a one-sided view as a limitation of liberty, was here as a fact only the fulfilment of its whole essence.*

The internal strength of this community is due to the fact, that among all the contrast and conflict of social interests, it directs the efforts of the people to the welfare of the State; that it arouses an interest in public life not only in the lords and gentry, but also in the middle classes; and that it binds together all classes of society in this spirit, before all giving to the upper classes those manly aims and that energy which seek their scope and their value in what the individual is worth in the State. The most simple recognition by the State is here the aim and the pride of a man's life, whilst where this feeling is wanting in the aimless doings of the upper classes the multiplied honours of the State become worthless.

It is not the rights of Parliament and the forms of parliamentary government that have founded England's greatness, but (as in the case of ancient Rome) the personal co-operation of all, from the lower classes in the social scale upwards, in

* At the close of the Middle Ages the peculiar tendency becomes prominent, which by abolishing class-barriers has advanced the free development of the individual in an incomparable manner (p. 106). Elections and franchise, press and right of unions, have become the mighty bonds of this liberty, the essence of which is self-activity in the State. They have, under these surroundings, become the powerful levers of liberty, where they bind together the ideas of a people, which in daily exercise of them has won the consciousness of public duties, the practical knowledge of the State, and the right feeling for it.

the daily duties of the State. The individual institutions are simple, sober, and earnest, as in the old Roman life, far removed from the fantastic pictures once disseminated in Europe by the author of the "Esprit des Lois." But these sober institutions are firm and durable, and in the hour of danger and trial, when great tasks are imposed, they display the energy and the greatness of character of a proud free nation. In the struggle for the American colonies, and still more in the struggle with the French revolution, it was apparent from the results, what the education of a people for the duties of State may accomplish. In old England, upon a territory of the extent of about three Prussian provinces, a State had grown up, which incorporated Wales, Scotland, and Ireland, colonized the North of America, possessed itself of the wealthier part of Asia, as well as of a new quarter of the globe, had gained the maritime supremacy of the world, and an equality with the continental powers through the glories of its arms. And what seems to be more than all this, we perceive a nation, which, forming the pivot of the commerce of the world, had accumulated the wealth and the luxury of the whole earth, which in every generation had assimilated with its gentry numbers of parvenus and nabobs, and in all the fortune and glory of a world-wide dominion had preserved simplicity of manners, the love of truth, the fear of God, and the sense of justice and moderation that is due from the strong towards the weak.

It is human nature, that all progress, whether social, ecclesiastical, or political, should, on the other side, be productive of contradictions, disparities, and injustice—all which create ever fresh problems in the development of the nations of the earth.

We will grant that the magnificent development of the British nation since the day of Magna Charta was pre-eminently achieved by the courage of the upper classes of society, by their foresight and love of liberty, but we are yet obliged to confess that its blessings also tended primarily to the enhancement of the aristocracy. The English political system has,

accordingly, the dark sides inseparable from all aristocratic states, due to the constant pressure they exercise upon the weaker classes. The State of the eighteenth century, although in the hands of the best aristocracy in Europe, did nothing to promote the advancement of the weaker classes; and to this end the Stuarts had also certainly never contributed a jot. During this period, little or nothing was done for the maintenance and emancipation of small landed proprietorships; whilst the Latifundia, on the other hand, had steadily increased. The propertied class had never actually withdrawn itself from taxation; yet only under its influence could that luxuriant system of indirect taxes and protective duties for the benefit of trade and agriculture, but to the prejudice of the labouring classes, arise; or that profligate waste of the national revenue and the enormous indebtedness, to the detriment of the country at large. Only under a ruling gentry, could a system of civil justice be upheld, which, owing to its costliness, was inaccessible to the lower classes, and, side by side with excellent forms of penal procedure, a confused system of criminal justice, disfigured by exceptional laws. To this was added the lack of an effectual sanitary system and a pauper legislation, which spent itself in an illiberal system of settlement, and which, in spite of high poor rates, oppressed and embittered the lot of the labouring classes. The peace which the Anglican Church had concluded with the parliamentary constitution had, it is true, consolidated constitutional unity; yet the corporative independence of the wealthy State Religion still existed with tangible prejudice to the lower classes, who were abandoned to neglect by a Church now too aristocratic for them. Similar was the position of the universities, which maintained their corporate independence at the expense of learning. Science, so far as it was not fostered by corporations and endowments, was left to the energy of the individual and the protection of the great; the ways thither were inaccessible to, and unlooked for by, the masses. But chiefly, and before all else, the rich Anglican now vied with the powerful Roman Church in

its complete neglect of popular education. Neglect, poverty, and demoralization are found in the broadest layers at the base of the social pyramid, and, in the ponderous structure of the parliamentary constitution, the difficulties in the way of all social reform were so many, that the most eminent statesmen of the eighteenth century in England were almost as sincere admirers of enlightened absolutism as the best educated classes on the Continent were of the English constitution.

Yet, in spite of these blemishes and failings, the cohesion in the constitution was so firm that, at the close of the century, there was as little prospect of revolution as of reform. From the bottom upwards, the mass of the working population was literally rooted to the soil and, except in few places, inaccessible to revolutionary ideas. On the other side, the position of the ruling class had become so secure, and had been so much strengthened by the national struggle with the French empire, that all immediate attacks upon it were sure to be futile. The ideas of the French Revolution and the emissaries of the Jacobin clubs produced, it is true, a certain contagion, yet only upon a small stirring circle of fanatics and some doctrinaires among the ruling class. This fanaticism even culminated in attempts upon the life of the monarch, and in violent tumults, which appeared sporadically in convenient places. But such attempts were suppressed by the ordinary constabulary forces, only in a few cases calling for military intervention, and were merely followed by a few Acts of Parliament aimed at the repression of revolutionary pamphlets and societies (a Traitorous Correspondence Act, an Alien Act for the control of foreign subjects, and sundry kindred, but moderate, measures); all which passed the House of Parliament by large majorities. The mood of the nation was concentrated to such an extent upon the issue of the war with Napoleon, that no interest was felt in internal reform.

The close of the great struggle (1815) was followed by troublous years of bad harvests and commercial and industrial depression, affording a fruitful soil for socialistic agita-

tion. This was the period of extravagant demands, and of huge, and sometimes violent, assemblages, which resulted in a serious loss of human life and destruction of property. These excesses called forth a series of temporary Acts of Parliament (Lord Sidmouth's Six Acts), which again passed Parliament by great majorities, although they went further in limiting the right of petition than either circumstances warranted or, considering the character of the constitution, was advisable. The Government under George IV. was, owing in some measure to the monarchy, somewhat vacillating; for changes of ministry were frequent—four distinct ministries once within eighteen months. The attitude of the propertied classes, however, left no doubt as to their determination to guard their possessions by all legal and constitutional means.

As in the twelfth century, so in this also, the first breach in this firm basis was made by ecclesiastical affairs. Although, after the fruitless attempts of the Stuarts, the National Church attained unconditional sway in England, and became in the course of the century reconciled and blended with the ruling class; yet this grand success was gradually followed by a want of fervour within the Church itself. The higher grades of the clergy were drawn into the "high life" of the aristocracy, whilst the majority of the benefices were committed to the charge of miserably paid curates, in spite of the growing spiritual wants of a rapidly increasing population. The period of enlightenment in England (as well as on the Continent), whilst introducing religious toleration among the upper classes, produced in them an indifference to the education of the lower orders, which, in the second half of the century, drove numerous elements of the population to a methodism which offered the thirsty soul that which the aristocratic State Church denied. This dissenting methodism, though void of political aims, tended all the same to undermine the social scale and to lead to separation from the political system then obtaining. The glorious Revolution had, out of fear of popery, retained all the Test and Corporation

Acts, which excluded dissenters from offices and political rights. A sensible contradiction to this exclusive monopoly of the State Church had now arisen through the union with Scotland, in which land the Presbyterian Church in turn entirely excluded the influence of the State Church, whilst in the English Parliament both Presbyterian and Anglican members were expected to exercise concurrently the highest political rights! Since the accession of George II., this contradiction was overridden, in the practice of ignoring Protestant dissent in official appointments, and by the constant repetition of a "bill of indemnity," declaring all infringements of the law which had occurred exempt from punishment. Thus were the Dissenters gradually placed upon an actual footing of equality, promoted by the progressive spirit of religious toleration. On the other hand, the exclusion of the Roman Catholics from all political rights was adhered to with obstinate consistency. Even the laws debarring them from the acquisition of real estate, as well as draconian penal laws, which were however not actually put in force, still obtained. George III., and the majority of the nation, perceived in that Church not merely an ecclesiastical, but an essentially political, institution, which, owing to its extension over all the States of the inhabited globe, and to its claim to external sway over the life of nations, as well as to its pretensions to a complete recognition of sovereignty in its spiritual head, was incompatible with the constitution of the country. This view was so deeply rooted in George III., that all attempts made to pass an act of toleration were foiled by his unyielding will.

The breaking down of this opposition was the immediate consequence of the difficult situation resulting from the union with Ireland. The rule of the Emerald Isle had for centuries been the blackest spot in the whole of English parliamentary government. The antipathy of the two races had, ever since the Reformation, been increased by the antagonism of the Roman Catholic Church, to which the great majority of the population remained faithful, whilst the conquering Pro-

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testant settlers were in the ascendancy in respect of landed property, commerce, and industry. For the latter, the island was a conquered country, partly colonized, and administered, even in the eighteenth century, in a manner reminding only too vividly of the provincial government of the old Roman Republic. This complete neglect and merciless fleecing could not go on unchecked, now that the war with the American colonies had rendered a military occupation of Ireland almost impracticable, and made even the employment of the natives in the standing army and as volunteers unavoidable; to this was added the fact, that shortly afterwards the breaking waves of the French Revolution made their effect felt in Ireland. The English ministry now at length resolved upon conciliatory concessions, and began with an attempt to give the country an independent Parliament (1782). But it was soon perceived that want of coherence in the elective bodies, as well as the rivalry of nationalities, rendered a durable Parliament an impossibility. The union with Scotland became necessary as early as 1707, as the English and Scotch parliaments began to pass conflicting resolutions, which threatened to throw both constitution and government into confusion. The same thing occurred, when the independent Irish Parliament began to pass divergent resolutions affecting the Regency and other matters. But of still greater moment was the circumstance that this independent Parliament was regarded by the Irish national party merely as an engine for separating themselves from the Saxon land, which they abhorred both as a nation and as a church. This increasing tendency to secession burst forth, in the years 1794–98, in open rebellions and in French invasions, in which the native population behaved with a fury and cruelty which remind us of the wars of the red-Indians. Pitt here perceived no other way of escape but to unite the country with England upon terms of economic and political equality. The State taxation was regulated according to a fair scale; the numbers of deputies (according to an average of population and taxation) fixed at 100, and to

the Upper House were added a smaller number of 28 members elected from the Irish peerage for life. The accomplishment of the union appears to be one of the *chefs d'œuvre* of this illustrious statesman.

But with the union with Ireland, the ecclesiastical basis of the parliamentary constitution was brought into a new position. In England itself, a considerable portion of the population no longer owned the Anglican Church, and this number at the beginning of the century amounted to several millions. In Scotland, more than three-quarters of the population belonged to the Presbyterian Church, even to the strictest exclusion of the Anglican. In Ireland, more than three-fourths of the people, now blessed with equal political rights, belonged to the Roman Catholic Church, in the face of whom the Anglicans could no longer assert their position of being both politically and ecclesiastically considered, the sole privileged class. A united church in a united State, as the basis of the parliamentary constitution, had thus become an impossibility. Next followed (1828) the formal repeal of the Test Act and Corporation Act, and with it the actual rending of the old bond between Church and State, which had, in the case of the Dissenters, been already dissolved. And now at length, after a struggle which had been protracted for more than fifty years, there followed, as an inevitable consequence, the so-called Act of Emancipation for the followers of the Roman Catholic Church. The fatal policy of the Stuarts was still in such vivid remembrance, that the Saville Act of 1778, which only repealed some few of the draconian penal laws, viz. against the reading of mass, against the education of children in Catholic schools, and the incapacity of the Catholics to acquire real estate, led to the formation of a great counter-league of threatening attitude, and, two years later, to the dangerous Gordon Riots. The constant revolts and the enmity of the Irish population kept these feelings so much alive, that Pitt in 1801 found himself unable to add the clause of emancipation to the Act of Union. This was the sole reason for the resignation of the great minister, who, in 1804,

was summoned by George III. to his second ministry, only under the condition of relinquishing this question. In the year 1807, Grenville's ministry was again wrecked on this rock. The years 1813 and 1817 saw the Grattan bills; 1819, motions in this matter were renewed in the Lower House; and in the years 1821 and 1825 in the Upper. But it was the threatening revival of the Catholic Association, the illegal election of O'Connell as member of the Lower House, and the recent repeal of the Test and Corporation Acts that, in 1829, brought the matter to a climax. George IV. having once more, in consequence of the intended alteration of the oath of supremacy, withheld his consent, yielded to the consequent resignation of his ministers; whereupon the bill passed, by 320 to 142 votes in the Lower House, and by 213 to 109 in the Upper.

A breach was thus effected in the entrenched position of the ruling class, through which further reforms might begin to pass.

Already, in the first decade of this century, the legislature had shown a somewhat altered frame of mind by passing some *social reforms.* The ripe fair fruit of twenty years of assiduous labour was (1807) seen in the legal prohibition of the slave trade, which, in spite of the great sacrifices it entailed, was forthwith carried into execution in every detail. The repeal (1824) of the old penal laws against labourers' unions and of certain hindrances to their freedom of settlement was an important boon to the working classes. The modest beginnings, too, of factory laws for the protection of operatives began to be visible.

With an equally modest commencement did a tendency towards *administrative reforms* begin to show itself; such as the suppression of the excessive number of sinecures, all created in the interest of the ruling class; the appointment of a commission to reform the antiquated Court of Chancery; reforms in the customs tariff, so overburdened with protective duties; the abolition of the trading monopoly of the East India Company, and modifications of the Navigation Acts.

There was, however, no prospect of thorough political

reform whilst the constitution of the Lower House remained so marvellously knit up with the upper classes, both in country and town. A removal of these anomalies would necessarily attack the very heartstrings of the ruling class of society. The unjust anomaly of a mass of borough constituencies, more than ten times as strongly represented as they should be, considering their population, had long been recognized. The first proposal, an ill-considered bill, brought in by the Duke of Richmond (1780) to replace it by an universal equal suffrage, was rejected without division. The very moderate proposals of Pitt (1782, 1783, 1785) to disfranchise only thirty-six decayed boroughs, and to distribute the vacant suffrages between the counties and the metropolis, failed even to pass the House of Commons, as that body could not calculate what influence this amputation might not exercise upon the strength of parties. In vain did the newly formed "Society of Friends of the People" offer (1792) to prove, that at that time some 200 members of Parliament represented small boroughs of less than 100 electors, and that altogether 357 members were as good as appointed by 154 powerful patrons. According to a later calculation, 300 members were elected by the influence of peers, 171 by the influence of powerful commoners, and sixteen owed their seats to royal influence, so that there only remained 171 freely elected members. The Lower House refused all revision of the numbers of qualified electors; and the bloody scenes of the French Revolution now unfolding themselves before men's eyes, as well as Burke's fiery "Reflections on the French Revolution," filled public opinion with such dread of enfranchising the masses, that Grey's motions (made in 1793, 1797) were rejected in the Lower House by overwhelming majorities. The international war now being prosecuted against Napoleon riveted the attention of the nation to such an extent, that even Brand's motions, in 1810 and 1812, found but little support. The peace of 1815 was again followed by years of famine and commercial crises, by dangerous insurrections, a brutal attempt upon the life of the Prince Regent (1817), and

a Cato Street Conspiracy to murder the ministers (1820). Hence the now so-called radical reformers found an exceedingly unfavourable soil upon which to work. Sir F. Burdett's (1818) radical motions were rejected by 106 voices to 0. It was not until 1821 and 1822 that Lord John Russell dared to reintroduce proposals, which were, it is true, rejected in the Lower House by 269 to 164 votes; but the attitude of the press towards them was such as to augur a change of front in this respect. A petition presented by 17,000 *freeholders* of the county of York (1823), showed that this was no longer a question of artificial agitation, but of an *altered basis of society*, in consequence of which powerful propertied masses now supported the demand for reform.

During the course of the great struggles with France, changes, at first almost imperceptible, had been made in the interior of the country, yet changes which make the nineteenth century a completely new epoch even in English political life. The invention of the machine began to draw certain branches of rural industry to the towns; speedily attaining to greater dimensions in cotton, wool, flax, and silk, and reacting upon a rapidly increased consumption of coal, iron, and raw material, it soon concentrated industry and trade in a way formerly unknown; after the conclusion of peace in 1815, it also began to react upon agriculture, and finally, hand in hand with facilitated communications, to alter the economic conditions of the whole country. From decade to decade the transformation of the system of production became more and more apparent, as steam (and, shortly, railways) increased the pace. Real and personal property, productive and intellectual labour, entered into new and multifarious combinations, which, slowly progressing, shifted the propertied power from the landed estates to the capitalists. Production, consumption, and exchange, passed into a new and uniform system embracing the market of the world, and one which, in England, owing to its world-wide commerce and colonial possessions, attained to a most magnificent development.

Simultaneously with this reconstruction of the propertied

and industrial conditions of the country, there now appeared a new link in the relations of society to the State.

The accumulation of funded and industrial capital led to the formation of a large number of new households with an *independent personal estate* equal to the average income of the quondam ruling class; these, by the acquisition of real estate, and by filling the civic office of justice of the peace and the magistracies, coalesced in many cases with the landed gentry, without, however, participating in an equal degree in their habitual duties of public life, and lacking therefore the consolidated political influence of that older gentry.

The new combinations of capital and labour, the ever-increasing application of intellectual and technical knowledge and the business requirements of great trading and industrial firms, led likewise to a corresponding increase in the *middle classes*, who, although they paid rates and taxes on precisely the same scale as did the freeholders in the counties and freemen in the towns, were yet, according to the existing constitution, in great measure excluded from the franchise.

The *labouring classes*, finally, were, by the great industries, brought into almost entire dependence upon industrial capital, were as a rule without any participation of their own in the community of their neighbours, and had not the franchise.

The fusion of these new elements into the parochial union (which even to this day is the chief difficulty of the German Commune) took place in England with great ease, as the English parochial rates, following the elastic poor rate system, were from the first levied upon the actual occupier; the parochial rates upon houses and manufactories had on that system long since outstripped the parochial burdens laid upon land. But, on the other hand, the admission of these new elements to the parliamentary franchise met with the same opposition as was the case in the representative systems of the Continent. The rights of suffrage in the Middle Ages were inseparable from feudal and free tenure, which at that time bore the whole of the State burdens. This fact had long been forgotten. These political rights had from generation to

generation been alienated and acquired with the possession of the land, and, as such, were, on their broader English basis, guarded with the same jealousy as were the political privileges of the aristocratic landed estates on the Continent. This view was so deeply rooted, that Pitt, in making his reform proposals of 1782, was for purchasing the rights of the thirty-six decayed boroughs for £1,000,000 sterling, and, in effecting the union with Ireland, actually carried out such a system of purchase. The privileged freeholder in England could not therefore be readily induced to accord to the copyholder, the leaseholder for sixty years, or the mere tenant for a term, an equal suffrage with himself, even though, regard being paid to the altered value of money, the forty-shilling qualification was raised five to twenty times. The landlord in the towns more readily acquiesced in the occupier being placed on equal terms with himself, inasmuch as the system of select bodies was no longer feasible, and the occupier had long since had to bear the chief parochial rates and taxes. Thus it was that the towns, as a rule, inclined to the idea of reform. The struggle for the reform of the franchise appeared, accordingly, from the first nothing but a struggle for the privilege or equality of certain tenures, and has retained this character to the present day. (1)

Meanwhile, the first generation in the development of industrial society had run its course, and behind the reform movement stood no longer an agitation of the friends of radical reform, but a justifiable feeling of inferiority made itself felt in the new elements of the propertied classes and middle ranks. Their strength lay in the large towns, which were either unrepresented, or quite inadequately represented on the parliamentary register. But even in the boroughs summoned to Parliament, the old-fangled municipal con-

(1) The classes which were newly formed by the propertied and industrial conditions of the new society can, to a certain extent, be ascertained from the census tables compiled every ten years, and in the lists of the income tax and local rates, which last show how rapidly income derived from house property, from manufactories and mines, increases in comparison with that derived from land.

stitution, limited to the select burgesses, excluded them from political rights. In the country districts, the qualification of freehold was as much out of harmony with social conditions as with the rateability of the middle classes of industrial society. The representation of the northern and southern counties of England was out of all proportion to its present population. In Scotland the total electorate in the counties was restricted to 2500 heads, that of the boroughs to 1440, and that of the capital, Edinburgh, to thirty-three. The powerful influence of the press, and the right to establish unions, lent these aims and aspirations a weight which the ruling class now for the first time learnt to feel.

The consciousness of this new situation burst suddenly and unexpectedly forth, in consequence of the July Revolution in France, which gave the so-called *middle classes* in England the required influence over the Government, and, by virtue of the constant contagion it spread, (2) made the reform of Parliament at last an unavoidable necessity. The laws of 1828 and 1829 had cut away the ground under the feet of the high Tory party of obstinate resistance. After Wellington had, in September, 1830, solemnly declared that the parliamentary constitution needed no reform, in November, 1830, Lord Grey presented parliamentary reform to the House as the *ministerial programme*. On the 1st of March, 1831, Lord John Russell introduced the first draft of the Reform Bill, which, after a debate lasting seven nights and after seventy-one speakers had been heard, was admitted to the first reading, but only passed the second by 302 to 301. Having regard to the prevailing feeling of the population, William IV. was induced to dissolve Parliament, which, on its re-election, showed a very considerable majority for the proposed reform. The bill now passed the second reading

(2) The contagious influence of the July Revolution, with its ideas of popular sovereignty, was seen at the beginning of the third decade in a number of phenomena, which have since been forgotten. I remind my readers, for example, that in the wards of the freemen of the city of London formal resolutions were passed insisting that members of Parliament should for the future receive binding mandates from their constituents.

in the Lower House by 367 to 231; and, after long obstructions, the third reading also by 345 to 239. But, on the 8th of October, 1831, the bill was thrown out in the Upper House by 199 to 158, the consequence of which was a profound commotion, such as had never before been known in the country, accompanied by many violent disturbances.

A third bill was presented to the House in December, 1831, which passed the second reading by a majority of 162, and now, at length, passed the Upper House (after a few amendments had been made in it), by 184 to 175 voices. Yet a dilatory amendment of Lord Lyndhurst in the House of Lords again jeopardized the bill. The feeling of the country declared itself during this interval in a more serious manner. Several lords were insulted by the mob, Nottingham Castle was set on fire, and great destruction of property caused by violent insurrections at Bristol. It was impossible any longer to procure from juries verdicts against the authors of the passionate squibs of the time. Lord Grey calculated the number of crimes committed in consequence of the Reform Bill at 9000. The ministers, accordingly, demanded a new creation of peers, which was refused by the king; the ministers hereupon resigned. However, after the Duke of Wellington had vainly endeavoured to form a cabinet, the king personally intervened by privately communicating with the dissentient lords, requesting them to refrain from voting, whereupon the bill passed into law by 106 to 22, and simultaneously the kindred reform laws for Scotland and Ireland. The new basis of the Lower House was now as follows—

I. **With respect to the constituencies,** the Reform Bill followed the sound principle of retaining only real *communitates,* that is, counties and municipal boroughs, as constituencies; whilst paring down and restricting the totally decayed boroughs and distributing the vacant seats among the greater districts which had hitherto been insufficiently represented. Following this principle, 56 smaller boroughs, of less than 2000 inhabitants, among them the notorious Old Sarum, were completely

disfranchised; and 30 smaller boroughs of 2000–4000 inhabitants limited to a single member. On the other hand, 22 more important towns, hitherto unrepresented (Manchester, Birmingham, Leeds, etc.), now received two representatives; 20 other towns (18,000–25,000), one each; 25 great counties were divided into two divisions each, each of which returned two members; seven counties received three instead of two representatives; three Welsh counties, two representatives in the place of one. The remaining seats were sufficient in number to give Scotland 53 (instead of 45) and Ireland 105 (instead of 100) members.

II. With regard to the electoral qualifications in the counties, the old franchise of the forty-shilling freeholders was retained; yet in freehold for life, the right of franchise was made inseparable from the condition of actual possession, in order to prevent a multiplication of votes by a parcelling of estates. Apart from this reservation, *freehold* only gave the franchise, where a yearly income of £10 was derivable therefrom. In like manner, *copyhold* and *leasehold* for 60 years and upwards, of an annual value of £10. Leasehold of 20 years and more, only in case of £50 annual value. According to a Chandos Clause, inserted in the Upper House, every tenant and other lessees were given the franchise, where the rent amounted to £50 and upwards.

Through the decay of the municipal corporations in the towns, all principle in the matter had been so far lost, that by 2 Geo. II., c. 2, it was provided that that right of suffrage should always obtain, which had been accepted in the last decision of the Lower House. The Reform Bill gave the franchise in every case to the municipal middle classes, that is, to every occupier (whether owner or lodger) of a dwelling, a shop, a bank, or building of £10 annual value.

All rights of franchise were after the old system calculated not according to taxation and personal political duties, but according to tenure. But, in order to guarantee the cohesion of the electoral bodies, an actual payment of taxes and a lengthened residence within the constituency or an acquisi-

tion of real estate by inheritance or marriage settlement remained the essential qualification.

III. **With respect to the electoral procedure,** an important innovation borrowed from France was introduced, namely, that complete registers should henceforth be made by the local authorities, under the control and supervision of revising barristers, with appeal to the high courts of justice. To be entered upon the register was a necessary condition precedent to exercising the franchise. Whilst in former days the tedious legitimation of the electors protracted the election for weeks, the poll now became limited to two days, and soon to one, and thus the old election disorders were in great measure put an end to. A sharp *Corrupt Practices Prevention Act* (1854) attempted finally to prevent bribery and corruption still more thoroughly. (3)

The number of electors, which at the time of passing the Reform Bill was reckoned at 400,000, was by that bill as nearly as possibly doubled. On the completion of the new electoral system (1852), in the county elections for England and Wales, there were counted: 322,619 freeholders, 23,097 copyholders, 21,104 leaseholders, 99,019 tenants from year to year. The number of borough electors too was given in the draft for the second Reform Bill at only 488,920. Moderate as this extension appears, in comparison with the constitutions of the Continent, yet, considering the position of the English parliamentary constitution, it still sufficed to make the middle classes no longer a moderating but a leading factor of the parliamentary system.

(3) The technical details of the Reform Bill have been here intentionally passed over, and especially the not very considerable divergencies in the Reform Bills for Scotland and Ireland. These details have been given in English treatises in a very complicated casuistry. For the most explicit treatise *vide* Lely and Foulkes, "The Parliamentary Election Acts," London, Clowes and Sons, 1885.

CHAPTER LVIII.

The Parliaments of the Nineteenth Century down to the Second Reform Bill (1867).

In ancient times an aristocratic constitution, as found in England at the commencement of the nineteenth century, would have ended with the oppression of the lower classes and in a helotdom. It is a grand testimony to the power of Christianity and nationality—especially in the ruling class in England—that from those conditions the English society effected a transition to a *century of Reform Bills and Social Reform*. In like manner, we shall not be able to deny the old Whig party the recognition that, faithful to its traditions, it carried out the difficult task of reforming the popular representation with courage, persistency, and judgment, and without destroying the old cohesion of the elective bodies of the House of Commons.

In the January of 1833, the first reformed parliament, in which only 172 Conservatives opposed 486 Liberal members and their associates, assembled. In the very first session of its meeting, it was confronted by a whole pile of reform measures, which, proceeding from a long-checked current of popular opinion, were doomed to speedily present great difficulties to the present majority and its ministries. The reform movement which had now burst forth, is divided henceforward into the threefold tendency of social, administrative, and political reforms.

1. *The province of social reform* was primarily directed against the class privileges of the old ruling class. Using great moderation, this tendency contented itself with repealing the qualification of £600 and £300 income from real estate for the representatives of the counties and towns respectively. This qualification had been introduced a century previously, in order to render it difficult for capitalists to enter into competition with the landed gentry. It was now simply abrogated (1858). Motions for depriving the bishops of their political functions in the Upper House, and for creating a number of life peers in addition to the hereditary peers, were as yet rejected.

Still more incisive were the attacks made upon the *economic privileges* of the ruling class. First of all, upon the great trading monopolies which were abolished after fair compensation; next, upon the overspreading system of *protective customs*, which being universally recognized as pernicious for a country marked out for a great commercial and industrial future, were in great measure suppressed, and reduced to a few profitable finance duties. The Corn Laws followed suit, after violent resistance. Although Lord Melbourne, as late as 1839, had declared that he considered the plan of leaving the great agricultural interest without protection most quixotic and idiotic; yet the Anti-Corn Law League and the power of the press in the years 1838–1846 managed, under Sir Robert Peel, to pass this measure also. The powerful interest of the land had also to accommodate itself to the redemption of tithe, to the regulation of the peasant burdens of copyhold, and to a system of the partition of common rights (though with comfortable modifications).

The demand for religious equality necessitated the further repeal of certain antiquated penal statutes, and the granting to the dissenting sects of many rights necessary for the management of their property and the conduct of their services. The admission of Jewish members to the Lower House met for a long time with the resistance of the Upper House, but was at length (1858) rendered possible by a clumsy and dangerous

compromise, which permitted each house itself to prescribe the form of oath for its own members. (1)

As in old days at the Magna Charta crisis, so now in the nineteenth century, did the propertied classes not forget that care for the weaker classes is the vital condition of every free constitution. The grand work of suppressing the slave-trade was extended yet further to the far more difficult task of abolishing slavery itself; this was accomplished circumspectly and successfully, at the expense of £20,000,000 sterling from the State coffers. Far more difficult and manifold were the social reforms in favour of the *operative classes*.

Favourable as was, in the first decade, the influence of steam-power and manufactures for the external independence and wage-earning of the working classes, yet, as time went on, the wages question became more unfavourable. Within a generation there was produced in the new "proletariat" a picture of a degenerated family life, visible in lodging, food, clothing, ill-health, poverty, and the starvation and degradation of women and children, which for many decades showed the black sides of the new order of society. The years next following the Reform Bill were, owing to the commercial depression of the time, calculated to give these classes, in their spirit of opposition to the propertied classes, a feeling of common misery and of great common interests, which after 1839 assumed a threatening character in the Chartist movement, which, however, finally ended in a mere mass-demonstration (1848). Without showing itself dismayed by the threatening attitude of the working classes, the legislature at once addressed itself to the practical solution of the social questions, and began by removing the worst ills attendant upon family life; restricting the work of women and children, shortening the hours of toil, removing the immediate dangers to life and health in factories and mines—by appointing factory inspectors, upon whose reports the protective measures should be expanded and extended from decade to decade, and by forbidding the

(1) An Act of Parliament for giving civil equality to the Jews, passed in the year 1763, but in consequence of the violent opposition of public opinion it was withdrawn in the following year.

truck and cottage system, so as to prevent a recurrence to villeinage. It afforded legal protection to the weaker classes, by granting a system of civil justice accessible to all alike, an effectual court of arbitration, and by guaranteeing the freedom of trades unions, even to the enforcement of higher wages (modified, of course, by penal clauses against abuse of them, which sometimes showed itself in a flagrant form). But of immediate and permanent effect upon the amelioration of their condition was the reduction of the prices of all the necessaries of life (corn, meat, tea, coffee, etc.), as a result of the repeal of the Protection Laws, thus lowering the housekeeping budget of the poorer classes by one-third, on an average, whilst the freedom of unions and the conditions of the international market obtained a slow, though on the whole, steady increase in wages. The thorough and very valuable sanitary and building reforms, in a series of Public Health Acts, primarily benefited the working classes. For the much neglected elementary education, Parliament, in the year 1833, voted £20,000, which sum, in the course of years has been raised more than a hundredfold, and has developed into a steadily progressing system of popular education. This social legislation, embracing, as it does, all sides of economic and family life, has known how, at the same time, to promote free self-help by an adequate regulation of the union system, in savings banks, burial clubs, sick clubs, friendly unions, mutual societies (under certain circumstances, also, with State guarantees and State grants). Finally, for the unemployed, we meet with kinder and more humane poor-laws, doing away with, at all events, the narrow-minded repulsive system of former generations. This side of State policy is and remains essentially an endless one, and, considering the peculiar conditions of the greatest industrial and commercial State in the world, is not yet able to satisfy the weaker classes. Looking back, however, upon what has been done and attained in the course of a generation, we are compelled to admit that the legislature has worthily recognized its duties and has remained faithful to its position as a propertied class in a free country.

II. **The province of administrative reforms** addressed itself to the reform of the abuses which at all times arise in the appointments to and the management of public offices, under the stable sway of a ruling class. But here the excessive precision used in laying down all the rules of administrative law by statute, much as it tended to protect against the abuse of party-government, gave, on the other hand, to the whole system a clumsiness and rigidity which rendered these reforms most difficult to make. The generation immediately following the Reform Bill displayed here also a great energy, comparing very favourably with the contemporaneous condition of most continental states.

In the *department of war*, the experiences of the Crimean war led to the comprehension of the whole administration under one war office. The place of universal military service, unfeasible in the case of England, is taken by a wide system of volunteer corps, which contains the germs of further development.

Justice also experienced very energetic reforms in the institution of the new county courts, which for the first time afforded a system of civil justice accessible to the public at large; in the thorough reconstitution of the civil procedure, the chancery procedure, and in the newly organized courts of probate, bankruptcy, and divorce. The criminal procedure attained a practical form for the metropolis, in the institution of a central criminal court, as also in a model system of preliminary examination, and the codification and extension of summary criminal procedure. Thorough reforms were made in the confused and intricate criminal law. Whereas, during the period between the Restoration down to the accession of George IV., not less than 187 transgressions of the law were visited by capital punishment, the death penalty was henceforth confined to high treason and murder; the punishment of the whipping-post and the numerous penalties of confiscation were abolished, and transportation for life replaced by a rational system of imprisonment.

In the *department of finance*, after the system of pro-

tection had given way to the policy of great finance-duties, by the cancelling of many hundred parliamentary statutes, a consolidation of the Customs, Inland Revenue, and Stamp Acts was brought about. Sir Robert Peel's Income Tax law, with the insertion from time to time of amendments, has given proof of its vitality. The much-prized post-royalties passed into the penny post system. For the control of the finances, so neglected by party governments, the Commissioners of Audit, in conjunction with the Bank of England and a financial commission, appointed effectual organs, as it did also in respect of the newly formed Commission of the National Debt.

In the *home and police department*, the parochial constables, whose services had become insufficient, were supplemented, first in the metropolis and afterwards in the country, by paid police in military organization, all brought into practical connection with the police courts and the justices of the peace. Certain branches of trading laws, especially affecting public-houses, were newly consolidated; these latter, after many experiments, having again to be dependent upon the magistrates for their licence. After a careful consideration of the agricultural and game interests, the game law of 1834 was passed, which put an end to numerous social injustices.

In the field of commerce, the codified *Merchant Shipping Act*, as well as a fragmentary piece of legislation to replace the somewhat deficient State control of private railways, are of importance.

A *strongly modernised department of home administration* was developed from the economic self-government of the parishes. It was opened by the great *poor law legislation* (1834) and its numerous amendments, in carrying out which a central poor-law board, with its inspectors and auditors, presents a picture of centralization such as was until then unknown. By the formation of unions of parishes and the building of workhouses, the severe abuses of the ancient regime were energetically removed, though still attended by great hardships. Next came the *Highway* Statute of 1835, which, in the formation of greater unions, followed the example of the

pauper legislation. After numerous unsafe experiments, the *Public Health Act* (1848) and following statutes brought some degree of order into the sanitary and building regulations of thickly populated districts, through rigorous powers of inspection exercised by a central board. In the case of towns having a municipal constitution, a new municipal law was passed in 1835, which, removing the antiquated and decayed state of things, replaced it by a uniform government by mayor, aldermen, and town councillors, retaining the police control in the hands of special commissions of the peace appointed by the crown. After a generation had passed away, this local government of the new style was formed into one whole under a newly created minister (Local Government Board).

In the department of *church government,* the State found analogous tasks as in the "self-government," inasmuch as, owing to the old legal control and the corporative character of the Church, grave abuses had crept in, such as the Church, as a body, did not on its own account know how to master. As carefully then as benevolently was the government of State Church property reorganized by mixed boards, its dioceses and offices increased where required, thousands of churches and chapels founded by State and private means, and richly endowed for the needs of instruction and religious service. With like consideration, to the avoiding of questions of dogma, were, after reference to ecclesiastical commissions, the vexed questions of ritual, of Church discipline, and the formulating of the oaths of office, settled; thus restoring to the State Church a rejuvenescent activity both in teaching and preaching—in marked contrast to the condition of things which a hundred years previously disgraced the Anglican Church.

In the field of *education,* reform contented itself for the present with gently compelling the universities and foundation schools to make new statutes. More energetic was the advance in the elementary school system to comprehensive regulations under the conduct of a new minister (1856), and

with a special department for promoting art and industrial schools by the aid of considerable State allowances.

In the province of *colonial government,* the mother country decided, after bitter experience, to grant independent governments to those colonies, which, owing to their situation, their population, and degree of civilization, were most fitted to receive them, reserving a supreme legislature in the English Parliament. The government of the East Indian Empire, after the suppression of the Sepoy rebellion, was, by a new law of organization (1858), handed over to the central government, which exercises control over the governors, the tribunals, and the chief departments of administration, as also over appointments.

More than one hundred comprehensive administrative statutes and a reorganization of the whole of the civil service testify here also to the energy of the British parliamentary Government. (2)

III. It is only in *the province of political reforms,* that is, in the *organization of local bodies,* and in the development of the parliamentary constitution, that the failures of the new order of things are seen. In the case of administrative reforms, the excellent business habits of the ruling class, and, in the field of social reforms, the practical sound sense of the commercial classes benefited the land. For the following class of laws, on the contrary, the English parliaments lacked practical experience, no less than did the parliamentary bodies of the Continent. The organic statutes, out of which the parliamentary constitution grew, are traceable to the direct initiative of the monarchy when at the zenith of its power (Henry II., Edward I., Edward III., Henry VIII., and Elizabeth). The parliaments of the eighteenth century had only drawn their life from existing institutions. New creations of this kind were born as little of the party struggles

(2) The English administrative law, which appertains as much to the nature of the English political system as does the parliamentary law, was, at the time when the constitutional theories in France and Germany were laid down, as good as unknown. Cf. Gneist, "Engl. Verwaltungsrecht," 3rd edit., 1883-84, 2 vols.

of the eighteenth century as of the civil wars of the seventeenth; the Commonwealth, for example, did *not* leave to posterity *one single* organic law. Such new laws were now imperative, seeing that, in the transition to a new order of things, old bonds are dissolved and must be replaced by new, such as under the influence of strong impulses and favourable conditions took place in Prussia in the years 1808–1815, 1872–1876, but even there they were not due to public opinion, but to the monarchy. This problem could, however, be as little solved by the English Parliament, as by the Diets of the Continent, for the reason, that such laws are not wont to proceed from the struggle of the social classes for their share in parochial and political life.

The upper foundation of the English parliamentary constitution, namely, the *unity of the National Church* in the National State, was lost with the repeal of the *Test* and *Corporation Acts*. The now recognized religious equality was really at first only intended as a placing of *individual followers* of various confessions upon an equal footing. But in that these dissenters formed great and distinct religious systems, the religious equality of individuals did not content them; they now demanded more, an equality of *churches*. These pretensions were advanced by no denomination so intensely as by the Roman Catholic Church, which claimed the exclusive management of its own Church as being part of its doctrine. The Curia consequently proceeded to a formal organization of its spiritual offices and dioceses in England and Wales (1850). A new state of things now ensued, in which an organic legislation was needed to determine the legal limitations, under which several conflicting churches and creeds might co-exist in one single state (as in Germany). On the other hand, the attempt made in the Ecclesiastical Titles Act (1851) to make the proclamation of the Roman hierarchy and the bearing of the episcopal title punishable by law, proved utterly wrong, and had soon to be abandoned. The reaction was felt in the demand for the disestablishment of the English Church in Ireland, and the further separation of

Church and State, in the face of which the welcome revival of love for the Church made the position of the State all the more difficult. In spite of the deep roots she had struck in the nation, the Anglican Church could not prevent secessions right and left, both in ritualistic and in dissenting directions. The Scotch Presbyterian Church had by this time, over a dispute as to Church patronage, separated into two almost equal halves. The Irish Church question was deeply divided and bound up with an antipathy of races. In all three divisions of the isles, a powerful Churchdom, deeply rooted in the feelings of the population, demanded exclusive recognition. If this, according to the demands of the churches, was to control the whole private life and the moral and intellectual development of the people, it must needs uproot political unity. Though standing upon a higher step of civilization, Great Britain has only now arrived at the point where Germany stood at the conclusion of the peace of Westphalia: namely, at a division into a Catholic and a schismatic Protestant country, the further development of which must eventually lead to a dissolution of the imperial unity (as would also have been the case in Germany, had it not been for the indefatigable activity of the territorial administration and legislation), analogous to the way in which, in the nineteenth century, the separation between Belgium and Holland was brought about, which was due entirely to this condition of things.

Equally privileged Church systems, of which the one, with its pretensions to exclusive recognition, will allow no rival, whilst the other, with its claims to exclusive validity, is not wont to tolerate any civil equality in juxtaposition to itself, cannot both develop in autonomous liberty without destroying the unity of both State and people. Instead of reflecting what common institutions and legal limitations this state of things demanded, English society withdrew itself from the solution of this problem in its confused ideas of a "separation of Church and State;" as though a separation of the ecclesiastical and political man were possible, and as if the Romish

or the Anglican Church would ever surrender its coherence and centrifugal tendency, even though the State (as the Prussian *Landrecht* does) gave them the appellation of "religious societies." The unavoidable problem of future legislation for maintaining the unity of the State and nation was, however, at all events in its beginnings, seen in the institutions of a common civil register (1836), of facultative civil marriage, of common elementary schools, higher schools, universities, common burial grounds, etc. But at the present there only remains the negative result, that the granting of equal privileges to the conflicting churches and their closer conjunction dissolves the basis of the parliamentary constitution, and introduces into Parliament itself confessional fractions, in addition to the political parties.

The next essential basis of the constitution, viz., the internal cohesion of the *communitates* had, as far as was possible, been secured by the Reform Bill of 1832. But the progress of social and administrative reforms led only too quickly to an unintentional shifting of the foundations. The new municipal regulations of 1835 again enabled, it is true, the whole of the citizens to share in the civic government. But this municipal government, in its permanent separation from the police jurisdiction of the magistrates, from the parochial relief of the poor and other important branches, was so insufficient in its character, that it could do but little to arouse and keep alive the public spirit of the community. Added to this, was the contradiction (so much warned against by Sir Robert Peel), that in the municipal constitutions an universal and equal suffrage of all households was introduced, whilst the Reform Bill had only summoned the £10 householders to the franchise. Thus there forthwith arose here a tendency to extend the parliamentry franchise, thus creating a fresh contrast to the county constituencies. In the last-named, the organization of the gentry in the magistrates' petty and quarter sessions still continued, though their influence upon the lower classes was on the wane. The suspension of the militia system, which, since 1829, had been the rule

did their influence no slight damage. Much further in this direction went the reforms in the pauper, highway, and sanitary administration, by which the justices of the peace were confined to a general jurisdiction and certain powers of inspection. Any further development in these loosely framed unions now depended upon the organization of local government in the *parishes*.

This lowest foundation of the parliamentary system had, thanks to the office of constable, churchwarden, overseer of the poor, and highway surveyor, as well as to the decided development of the local rate system, become such a stout pillar of the *communitates*, that we must look to the "cellular system" of the English parishes, in its close connection with the office of justice of the peace, for the real root of the resistance made by the *communitates* in the great constitutional conflicts. The ruling class was, however, to blame for the fact that in the course of the eighteenth century the local parochial offices had become degraded beneath their real significance. The old office of constable had become reduced to a despised policedom, which the better-situated inhabitants filled with substitutes. The smallness of the poor and highway districts, which was pushed further and further in the interest of the large landed proprietorships, pressed down these offices likewise to a mechanical service, which was but little sought for and little esteemed. Even the much-boasted English jury suffered under the increasing evil, that all the better classes withdrew themselves from serving, partly by the aid of the law, and partly by the sheriffs' bureau. Whilst thus the offices sank deeper and deeper, the mass of local rates increased, and, indeed, in proportion as the said offices were badly managed. The demand for a radical reform made, accordingly, from the outset the economic employment of rates its chief point. The reform forthwith took the direction of an adequate control of the often exorbitant expenses by trustworthy men in the form of a board. All that the ratepayers claim, is a share in *determining* how their money is to be spent, and in *appointing* the officials who are to collect

and spend it (influence and patronage), nothing more. Improvements in the poor laws, in the administration of highways, and in sanitation, nay, the whole province of social reform, required not only rates, but an extended personal activity for the present welfare of the district. These high personal duties (which were not forgotten in the German communal legislation) have been perfectly overlooked amid the English party struggles and conflicts. The degradation of the small parochial offices was attended by the consequence, that even in England the importance of the personal honorary office was completely underestimated. But, before all else, it was the nature of legislation born of parliamentary conflict, that only new rights, never new duties, were the objects of contention, for which latter in the present parliamentary elections it would have been utterly impossible to find a majority. In perpetual compliance with "public opinion," the legislature now let all *personal* obligation to serve on the new boards and parochial offices fall, and went even so far as to expressly release the parochial representatives from all personal "responsibility." (3) In the place of responsible authorities for carrying on a legal local government, according to the principles of self-government, ratepayers' local parliaments were created, which, after John Stuart Mill, gradually came to be known as "local parliaments."

With this fatal step, that of *doing away with every personal obligation and responsibility* within the *communa*, the roots of the whole structure have been eradicated, and this change, but

(3) An apparent exception is furnished by the English municipal law of 1835, which, in accordance with the old traditions of civic corporations, speaks of an obligation to undertake civil offices. But such a precept only remains on paper, when an universal equal right of citizenship is extended to every household. Nine-tenths of these small households can never undertake a civic office or be called on juries, and are never summoned for the purpose, let alone being compelled to do so. The self-deception of the democracy in this matter can be statistically shown, where, as in Prussia, owing to the three-class system of the ratepayers the real performances of the small households are seen. The author once (1860) proved, by the local statistics of Berlin and other towns, that the participation of the ratepayers of the third-class in the personal duties of the commune is even *considerably in arrear* of that which they yield in taxes, and that this very class, in demanding an equal suffrage in the commune, claims ten to twenty times as much as its performances would justify.

little noticed, will be productive of more momentous consequences for England, than the abolition of universal military service would for modern Germany. Here is *the organic fault in the political system of modern England*, a fault productive of even acuter symptoms. With this abolition of the personal duties of citizenship, the community actually passes into a *limited company* system, which quite erroneously goes by the name of self-government. The government of a commune can, from its very nature and essence, be as little based upon a system of voluntarism, as the national defence can be entrusted to volunteer corps pure and simple. The government of these integral limbs of the State-whole can only be conducted in accordance with the laws of the land, and the local resources obtained by compulsory rates may not be employed otherwise than to legitimate ends. But as the new boards declined all responsibity, the law was obliged to make the small paid clerks, auditors, inspectors, etc., as being State officials, responsible for such government, and, consequently, to place the rights of dismissal, discipline, and supervision under a central board. In order to make this inspectorial right effective, all details of this administration must be kept under the strictest control, exercisable by State inspectors and auditors. Thus arose the modern system of internal government by "boards," which, in its centralization and "tutelle administrative," is very similar to the French. But, together with the responsibility, the essential part of the official *influence* passed to the paid officials, and left only inferior functions to the remaining local commissions and honorary officers, so much so that the inclination of the upper classes to take part in it disappears more and more, and more still that of the justices of the peace to share in such a piece of business, where they are even made *ex-officio* members. The unavoidable consequence was, that the degraded constable's office surrendered all its police functions to paid policemen, and was finally entirely given up by the legislature, and that the overseers of the poor and the highways were in great measure replaced by petty, paid officials. To external view, the

result of these reforms may be summarized as follows: A corps of gendarmerie in uniform, nearly 35,000 men strong, and an almost equally strong staff of clerks and subordinates, as successors of the officials of self-government; a retirement of the wealthy and educated class from parochial life; this government held together and kept going by a wider and ever wider system of ministerial inspectors and rescripts. The extinction of a "parochial mind" is the ever louder cry, without reflection how party legislation has, in eager rivalry, brought about this dissolution of the moral and legal bond of union in the communes; so that ratepayers now stand side by side like so many shareholders in a company. This causes even the feeling of personal community in a union of neighbours to disappear, whence proceeds a further demand for a ballot, by which the elector completely isolates himself, and declines all moral responsibility, just as the representative of the parish refuses all legal responsibility. The bureaucracy humoured public opinion here also, by the invention of nomination papers, sparing the electors all trouble of meeting, deliberating, consulting, and counting; thus reducing the act of electing to a few strokes of the pen, which the elector puts on his voting paper. This is the last residuum of self-government, the sole trouble with which the industrial society of these days believes itself capable of exercising and asserting the "sovereignty of the people."

So do the *communitates* from year to year become further dissolved, these bodies upon whose *personal cohesion* the parliamentary system, at its rise as also in the course of its further development, rested, (4) and naturally do the altered views of the reorganized bodies react upon the House of Commons, upon the position of the leading party men, upon the press, and upon "public opinion."

The power of tradition has preserved to the elections, in the majority of counties, a certain permanent character, which is also the case with a great number of enfranchised towns; least of all, of course, in the rapidly increasing populations

(4) Cf. Gneist, "Engl. Self-Government," 3rd edit. (1871) chaps. 9–12.

of the great manufacturing centres. But, in proportion as the process of dissolution proceeds, do purely social views and opinions assert themselves, whose feelings are dependent upon the last impression, and whose aims are directed at their closest interests. The House of Commons has for a long time past appeared to these circles to be no longer a representation of communities—being organic unions of State, Church, and society—but as a representation of the temporary interests of the inhabitants of certain districts or groups. Whilst it is precisely in England that the institutions of the parish and the county, the parliament and the Church, have long laboured to form the counter-pole and the counter-organism of social interests, to compel the individual and accustom him to understand and fulfil his personal obligations in the life of the community, even against the natural bent of his interests: so also, after the parochial mind has become extinct, does society conceive of patriotism, self-control, and a sense of justice as products of voluntarism. Immeasurably multifarious is now the growth of social ideas, as to the improving of popular representation by new groupings and distributions. Woman's suffrage has obtained a considerable minority in the Lower House, and the "representation of minorities" scheme a considerable support in the Upper. Even many ministerial programmes for a second Reform Bill make the impression of *dilettanti* attempts. Every plausible idea of a new grouping of interests is regarded as an important discovery, until forgotten over the next fancy. Only up to this point does society become more and more unanimous: that the individual shall exercise his share in the "sovereignty of the people," isolated and alone and without responsibility, that is by the "ballot." The more the *douce violence*, with which the parliamentary constitution, when at at its zenith, pressed upon social interests, made itself felt, the freer did the English elector fancy that he breathed under the ballot.

As soon as local unions have ceased to form the links in the chain of public interests, there remains only the *press*

and the right of unions as the common bond.(5) As the last-named can only exercise its influence locally and temporarily, the press, which has now attained its full liberty, remains the leading factor. After the censorship (1695) had been removed, a very sensible limitation was still left in the draconic jurisdiction of the courts of law, in cases of sedition, conspiracy, and libel. By the Fox Act (1792), this limitation was much weakened, as the jury were now required to deliver their verdict as to the criminal intent of the author. Ever since the Reform Bill of 1832, the criminal prosecution of the press by the Attorney-General was considered to be ill-advised and unpractical. Lord Campbell's Act (1842) enunciated what was really an already existing practice: declaring the intention of "promoting the public weal" to be a sufficient ground of justification. A statute of 1841 withdrew all publications issued under parliamentary authority from prosecution. The year 1853 abolished the taxes on advertisements, and the year 1855 the last remnant of a stamp duty. The struggle for the Reform Bill, and the powerful conflict of interests which raged round the repeal of the corn laws, had shown the hitherto unknown but now irresistible power of the daily press. It was now actually *free*, that indispensable and universally necessary organ for the protection of interests, in all its excellent and admirable efficacy; yet *irresponsible* withal, more irresponsible than the new boards, accessible to all errors, and thus insufficient for giving to social aspirations and aims that moral and legal check which the State needs. (6)

These new vacillating bases of the elective bodies show plainly enough the *altered party-groupings* of this generation.

(5) It is nothing but self-deception, if we believe that this dissolution of the bases would be improved were groups of proprietors, professions, religious societies, etc., to be all formed once more into corporations. The lack of a common bond of society becomes thus all the more felt, and the more does the press and the political right of union remain the sole bond, with which the representation of the nation could under such circumstances attach itself to the Government.

(6) The development of the importance of the press, which a hundred years previously made its power felt (1769) in the famous and notorious letters of Junius, could here be only generally referred to.

After the repeal of the Test and Corporation Acts, the time for practical action on the part of the High Tories and High Churchmen was past and over. The Moderate Tories, taking part in the government of the country, called themselves *Conservatives.* The term *Liberals*, for the Whigs, gradually became customary, yet with a left wing of Radicals, and many other generally uncomfortable associates. The large Liberal majority (486) in the first reform Parliament, became very soon diminished, owing to internal dissensions. The later parliamentary elections gave (1835) 380 Liberals to 273 Conservatives, (1842) 286 L. to 367 C., (1847) 325 L. to 331 C., the latter, however, divided into 216 Protectionists, and 105 Free Traders, (1852) 315 L. to 299 C., (1859) 348 L. to 315 C., (1866) 361 L. to 294 C. The appellation Liberals and Conservatives was, however, only a conventional term; as a matter of fact, there sat in the Parliament of 1837 six fractions: 100 Ultra Tories, 139 Tories, 80 Conservatives, 152 Whigs, 100 Liberals, and 80 Radicals. It is evident how much, owing to the constant disintegration into small fractions which was taking place, the difficulties of forming a cabinet, both harmonious within, and at the same time in accord with the majority in the Lower House were increased. And these difficulties were added, moreover, to the more and more complicated problems which the government of a world-wide empire was called upon to solve.

There was scarcely a single year, in this period of 35 years, which was not marked by bad harvests and famine, by commercial and industrial crises, by revolts in Ireland, by the rising of Chartists and operatives, by rebellions in the colonies, by the insurrection of the great native army in India, and by great foreign wars—all this intermingled with internal conflicts as to protection and free-trade, and great social and ecclesiastical interests. The necessary consequence was a rapid change of ministers—Grey, Melbourne, Peel, Russell, Derby, Aberdeen, Palmerston; 13 changes within 35 years.

The weakest point, however, was and remained the organiza-

tion of the parish and new *reforms* in the *parliamentary representation.*

For half a generation after the Reform Bill, public opinion was sufficiently busied with other questions, as not to think of extending the franchise at once. The claims made upon the reformed popular representation were so multifarious and numerous, that the House (after 1839) was obliged to decline the discussion of the petitions presented to it, and to content itself with printing the more important ones. But the almost universal suffrage, which the Municipal Corporation Act and the new local boards had granted, passed from the local unions into the parliamentary constitution. As the healthy bases of self-government once did, so now did the faulty bases of boards determine the character of the body elected from them. Once more it was the February Revolution in Paris (1848) which spread its contagion to England, and, in the year 1851, the motions of Locke King found such support, as to cause Russell's ministry to bring in a new Reform Bill on the part of the Government. In spite of his former assurance, that the reform of 1832 should be final, Lord John now arrived at the opinion, that the lowering of the qualification from £10 to £5 would even have a "conservative" effect. But a principle for electoral reform could no longer be found, now that the obligation to do *personal* service had been abandoned in the whole chain of local institutions. Meantime also, the obligation to pay rates had been dropped, since, in order to render the collection of the smaller rates easy, it had become permissible to levy upon the *landlord* instead of upon the *occupier* (compounding rates), which in the great majority of cases was very soon taken great advantage of. By a fiction of law, the occupier might exercise the franchise, "as if he paid rates." If thus the payment of rates as a condition of a right to the suffrage was removed, a qualification of £5 remained just as justifiable as one of £10 yearly value. But all disputing upon the point led to resolutions passed in numerous assemblages demanding the lowering of the qualification. All discussion led to the same result in the eyes of

public opinion. Then began a rivalry between Liberal and Conservative party ministers with offers of reform, and continued for half a generation; each party endeavouring to take the wind out of the other's sails. At the last crisis, (1866) Gladstone offered to lower the qualification for *occupiers* to £14 in counties, and £7 in the boroughs, but was out-trumped by Disraeli, who (with certain amendments on Gladstone's side) descended to £12 for the counties and a general uniform household suffrage for the boroughs. In a parliament, wearied out by electioneering discussions, the third reading of the Reform Bill of 1867 passed the Lower House without a division, with the following results.

I. **With regard to the constituencies,** the second Reform Bill was forbearing. It disenfranchised no borough entirely; 38 boroughs (under 10,000 inhabitants) were, however, restricted to a single member. Liverpool, Manchester, Birmingham, and Leeds, received an additional member each; ten new boroughs were created. In constituencies returning three members, for the future only two votes to be given, in order to realize the experiment of minority-elections. (7)

II. **As to qualifications,** the forty-shilling freeholders in the counties retain the franchise, but a freehold for life only in case of actual possession; the £5 freeholders obtain it even without this condition. In the same way, the copyholder and the £5 leaseholders, all the rest as £12 occupiers. In the boroughs, every householder (whether landlord or lodger) of a dwelling or an independent dwelling obtained the franchise; sub-lessees also, if the lodging represented, unfurnished, a value of £10. (8)

III. **The electoral procedure** remained for the present unchanged, yet the introduction of the ballot was looming in sight. At the same time, the Lower House renounced its jurisdiction over disputed elections and left the same to the judges of the Supreme Court.

(7) The attempt still to make the actual payment of rates as a condition of exercising the franchise, will be discussed in the next chapter. Cf. Lely and Foulkes, "Parliamentary Election Acts, 1885."

(8) Cf. Lely and Foulkes, "Parliamentary Elections Acts," 1885.

On the passing of the Bill into law, the result was foreseen to be an increase of 2,000,000 in the electors, and, judging from the success attending the doubling by the first Reform Bill, the probable success of the trebling by the second could to a certain extent be foretold.

CHAPTER LIX.

The Parliaments of the Nineteenth Century down to the Third Reform Bill (1884–85).

The second Reform Bill, after its full development (1885), produced the following result, as regards the electors to the Lower House in England and Wales.

1. In the counties:	
Freeholders, copyholders, etc.	514,226
Occupiers and tenants	252,493
2. In the boroughs:	
Householders and lodgers	1,592,225
Sub-lessees	21,918
Owners, etc.	37,589

3. Altogether: county electors, 966,719; borough electors, 1,651,732; moreover, 310,441 voters for Scotland; 224,018 for Ireland, and 30,642 additional electors for the universities. Grand total, 3,183,552.

When compared with the elective systems of the Continent, this was no excessive extension of the franchise; for England it was sufficient to make the *organic fault*, which had been caused by the disarrangement of the bases of the parliamentary constitution, both patent and palpable, most of all in the province of political reforms.

The group of *social reforms*, which two decades earlier had done away with the elective qualifications of members of the Lower House, now proceeded to assail the remaining bulwarks

of the old ruling class. On the occasion of making reforms in the army, the qualification for officers and for commissions in the militia was abolished, as was also the lord lieutenant's right of nomination; in the standing army, the whole system of purchase was abolished. In the Upper House, motions for depriving the bishops of their legislative functions were rejected still; but a beginning was made by the removal of the Irish bishops. In like manner, a proposal for making up the full complement of the House of Lords by the creation of life peers (1869) was negatived; but, in reforming the Courts of Justice, some life peers were added to the Upper House; a precedent which will be abundantly followed. Still more serious is the attitude of public opinion towards every attempt at resistance in the Upper House; on all such occasions, the influential press lets loose in reflections as to the practical value of a "second chamber," which no longer betray any thought of the political and constitutional significance this institution has for England.

The economic privileges of the landed classes suffer a severe blow in the unhappy conditions obtaining in Ireland, where the radical land bills attempt to make good the wrongs of ages by attacks upon the property of living generations. Further onslaughts upon family entails, and the difficulties in the way of the transfer of land, have, for the present, only obtained some limitations of the first, and some simplifications of the second. But the agitation against the immoderate extension of the Latifundia, and for converting the system of tenure into peasant proprietorships, under the catchword "free land," appears steadily on the increase, and will, within measurable distance, assume a very threatening form.

The demand for the equality of Churches again begins its attack upon the Anglican Church in Ireland, the position of which, as the sole privileged Church for little more than a tenth of the population, became, after the Act of Emancipation, more and more untenable. After comparatively little resistance, this Church was (1869) "disestablished," and

partially deprived of its property—as the first step towards a further process of disestablishment, which began in England (1868) with the abolition of the church rate.

Laudable, however, is the steady progress of social reforms in the interest of the *working classes:* the wider application of the factory acts; thorough improvements effected in the sanitary system, entailing very heavy pecuniary burdens upon the parishes; the energetic institution of compulsory schooling, with the lowering or abolition of school fees, and with a rapid increase in the number of school-board schools for children of all denominations; the progressive laying down of a "jus æquum," determining the respective liabilities of employers and employed in comprehensive new laws; the provision seriously made for the amelioration of the dwellings of the working classes and other kindred measures, all which, though they do not prevent the revival of socialistic movements, will yet tend, to a certain extent, to keep them within legal bounds.

The second group of *administrative reforms* likewise assumes a more resolute character.

The standing army is made a normal national institution, by the promulgation of an army Administration Act in fixed terms (reserving an annual confirmation or emendation), and by the abolition of purchase of commissions in the army (entailing a pecuniary sacrifice amounting to £8,000,000); further, by ranking the East Indian army in the armed forces of the State, by definitely organizing the limbs of the army, by the formation of reserves, by incorporating the militia and the volunteer corps into the system of the army reserve, and finally by a uniform and strict administration of the whole in the newly organized War Office.

The reform of justice (after a protracted resistance) now gives to the Supreme Courts also a completely modernised form, by uniting the Lord Chancellor, the Vice-Chancellors and all the Lords Justices into one Supreme Court of Judicature, consisting of five divisions and a Court of Appeal; fusing, as far as possible, the Courts of Common Law, of Equity, the Eccle-

siastical Courts and other special courts into one single tribunal, with an entirely remodelled procedure.

In the province of *finance*, important alterations are effected by the organization of the disintegrated tax department into two Revenue Offices, by the extension of the postal system, by the State purchase of telegraphs, and by the extension of State supervision over private railways.

In the *home* department, local government continues to make steady progress by means of *boards*. The poor-law burdens pass from the parishes to the unions, and the highway and sanitary supervision gradually coalesces with the same system. The new small unions, or agglomerations of parishes, are to be brought, as far as possible, into connection with the magisterial police divisions. In the towns, legislation aims at fusing, as far as possible, the town council with the several boards constituted for the management of the poor, the highways, and sanitary matters. The bureaucratical system of home government is comprehended (1871) under a new ministerial department (Local Government Board). The elementary school administration takes a similar course, though in smaller spheres. The remnants of self-government are thus extinguished in the villages. The parish is reduced to a mere district for the collection of rates and the election of boards. The total result of these formations is given by the census of 1881 for the local government as follows: 242 towns with municipal government, 649 unions, 424 highway boards, 1006 urban sanitary districts, 277 rural sanitary districts, 2051 school-boards, 5064 parishes for highway administration, 14,946 parishes for poor-law administration, 13,000 church parishes and some other less numerous formations, all which are in imminent danger, on the occasion of the next reform, of being reduced to a mechanically uniform system of boards under the control of the central authorities. But the boards, with their universal suffrage and ballot, are paving the way for more advanced parliamentary reform.

There now follow for the reform of the universities, the yet

more radical University Reform Acts (1880); whilst the popular educational system is benefited by the National Education Acts (1870, 1873, 1876), which, by insisting upon compulsory schooling, by uniformly constituting school-board commissioners and inspectors, by placing all denominations upon an equality, and by the employment of considerable State funds, develop and extend the elementary school system as the law intends. Parliament itself is responsible for the saying, that after the large extension of the franchise "our future masters" must to some extent be educated for their profession.

The reform of the Civil Service, after the eradication of the abuses of party-patronage, though somewhat pedantically, has, on the whole, been successfully carried out.

Even in this sphere of action, an unprejudiced opinion cannot refuse to recognize the practical shrewdness and energy of this parliamentary legislation, so far as is necessary for the attainment of the nearest aims and objects.

But the dark side is seen in the third province; that of the organic legislation affecting the local and parliamentary constitution, where disintegration proceeds at a rapid pace.

In the discussions precedent to the passing of the Reform Bill of 1867, a serious attempt was made, upon the Conservative side, to insist upon the payment of rates as the condition and test of all rights of suffrage. The difficulty of carrying this scheme into effect was due to the fact, that the suffrage was hitherto based upon tenure, as owner, leaseholder, lodger, etc. But yet this clause was passed, viz., that the occupier, for whom the landlord has undertaken to pay rates through the "compounding rates," should only have the suffrage, in case he *personally* undertakes the payment of rates. But the force of habit and convenience, as well as the pretended difficulty of carrying it into effect, and before all else the tendency towards social equality, succeeded in breaking down this barrier. The poor-rate assessment law of 1869 quickly recurred again to the maxims that the occupier should have the suffrage, whether he paid the rate himself or *through* his

landlord, provided only that somebody paid the rate. This solution certainly recommends itself, by its simplicity and apparently humane consideration, relieving, as it does, the working classes from house rates and all direct local taxes, in the same way as the upper classes have on their part also released themselves from all personal obligations. But the results will show on a large scale that the legislature, by releasing the citizen from every civil tie, has left the "general rights of mankind" as the sole basis of the claim to exercise the highest political rights. The reduction of the citizen's position in the State to the abstract notion of "citoyen," the "atomizing" of society, which we are otherwise wont to ascribe to a single political party, was here compassed in active rivalry by both parties together, for the applause of public opinion. Henceforward there was no longer any principle extant that could resist any claim to the franchise —no, not even the enfranchisement of women and minors. There was thus presented a real chaos of new ideas of reform. The innate right thus created, then, logically claims to be exercised as a personal right of sovereignty, independent of any connection with any commune, and without any kind of responsibility, by ballot, which latter soon became a storm and stress-demand of this period, and immediately followed the second Reform Bill (1872). The Upper House attempted to resist, but in the ensuing session gave its consent to the bill as a temporary measure, with which mental reservation from year to year the ballot exists until to-day.

The motions for *extension of the franchise* thus supported, immediately followed the publication of the second Reform Bill. The equality cry at once attacked the unequal representation in borough and county. Why in one case an equal household suffrage, and in the other a qualification? The cry for "equalization" appeared already in 1872 in new motions for reform. Still more momentous was the demand for the equalisation of the *constituencies*, that is, for the creation of electoral districts, equal in point of population. Pitt's old maxim, that the electoral districts should be formed according

to an average amount of population *and rates*, now appeared to have been forgotten. The parliaments only withstood the ever-increasing pressure of popular demands for half a generation longer, that is, until the third Reform Bill (the Representation of the People Act, 1884), and the law for the redistribution of the electoral districts (1885), which, with some kindred statutes, forms a group of nine new constitutional laws.

I. As to the *constituencies*, "equalization," that is, a radical reconstruction of the electoral districts into *divisions with almost equal populations*, has now been carried into effect. To this end, 79 boroughs (of less than 15,000 inhabitants) have been entirely disfranchised, so far as electing a separate representative goes; 36 boroughs (under 50,000 inhabitants) retain only one member; 14 great boroughs obtain an increase in the number of their representatives, according to the ratio of their population; 35 boroughs (having nearly 50,000 inhabitants) receive a new franchise. The counties are one and all split up into electoral districts, nearly equal in population, each division returning one representative. This single seat system has likewise been uniformly introduced in the case of the boroughs, with the exception of 28 middle-sized towns, which have been left to return two members undivided. The county of York, for instance, forms 26 electoral districts, the city of Liverpool nine. The total result of this arrangement being, that the counties return 253 members, instead of 187, and the boroughs 237, in the place of 297. The average population of a county division is now 52,800 (formerly 70,800), the average population of a borough division 52,700 (formerly 41,200).

II. As to *qualification*, the third Reform Bill is based upon the simple principle of equalization, in that the household rateability of the boroughs has now been extended to the counties. The occupation of a house or independent dwelling (or even of a lodging of £10 rent, unfurnished) suffices in the counties to give the franchise. In order to make it equal with the boroughs, the qualification of occupier in the

counties has been reduced from £12 to £10. All former rights to the suffrage have been reserved as in the former reform bills; some electoral privileges have, moreover, been newly created in favour of service occupiers.

III. With respect to the *electoral procedure*, the polling hours have been fixed at from 8 a.m. to 8 p.m., during which the votes may be given, on the nomination-paper system, at the convenience of the privileged elector. The other amendments to the Corrupt Practices Bill and the electoral procedures are of no importance. The number of new voters, according to an unreliable calculation, is taken at 2,000,000; yet certain it is that the newly enfranchised are even less fitted to continue the time-honoured parliamentary government, than the 2,000,000 last admitted to the franchise before them.

The burst of enthusiasm, which accompanied the passing of the first Reform Bill into law, had spent itself before the arrival of the second. The third passed with a feeling of resignation in both camps, after both opposing parties had, however, each used all the methods of agitation to outbid the other.

The hope of the Conservatives, that the increase in the number of county members and the division of the great towns into several electoral districts will benefit their cause, will not be realized. For the advantage thus accruing to them will be more than outweighed by the fact, that the magisterial gentry lose their great bond of union in the counties, and are for the future distributed in knots among the small divisions of the shire, each with their loosely connected poor-law boards, parishes, and extinct boroughs. To this is added the unhealthy want of a landed peasantry and a settled agricultural population. Both parties will henceforward be doubly dependent upon the interests and feelings of the times.

As in the ecclesiastical reformation, so also in this transition to the new social order, England proceeded in the opposite

way to continental states. Though standing upon a higher step of development, England only at the close of the nineteenth century attained to the analogous conditions obtaining on the Continent at the commencement of its constitutional formations. A House of Commons still exists in name; but there are no longer *communitates*, and no longer the now antiquated responsible bodies; nothing remains but mere social groups, which find in the press and in their federations their common bond of union. After the disappearance of that cohesion, which in the old communitates modified their joint interests by paying consideration to the demands of custom and law, and which habituated the electoral bodies to that measure of self-control, political sagacity, and respect for law, which enabled a parliamentary party-government to exist with honour, we find those social views alone of influence which are perpetually engaged in struggle for rights, and which, with the regularity of clock-work, repeat themselves in one and the same direction among the civilized nations of our day.

The social equality-cry always places in the foreground its claims to the following *fundamental* rights: liberty and equality of person, of property, of the right of forming unions, of the press, of religious denominations, creeds, etc.,—all perfectly justifiable immutable postulates of modern society, but which, as abstract watchwords for heterogeneous conditions, lead to contradictory pretensions which are never satisfied.

The equality-cry of society claims, under the name of *self-government* and local liberty, not responsible bodies to carry out the laws and tasks of the State, but freely elected boards with autonomous powers to frame resolutions and grant offices.

The social cry of equality, as soon as it has descended from the middle ranks down among the working classes, demands still more, an equality of property, and an *equal value* for *labour;* which, hand in hand with the cry for political equality, leads to unsolvable and violent contradictions to the nature of society, the Church, and the State, but opens on *every* side to the demagogues free scope for action.

Without seriously and uniformly enforcing the *personal* duties of citizenship in the State, never and nowhere will a stay be found against the elementary power of these currents. If that tendency towards equality showed itself with redoubled vigour after the second Reform Bill, so will it, after the third, with threefold force give the social, administrative, and political reforms an acute character, to the further democratizing of the constitution and the bureaucratizing of the Government, for which the era of "radical parties" has now arrived, and with it the time of the caucus and political wire-pullers; although the nation has naturally little inclination to imitate American institutions. It is not street-excesses, as in former decades, that are the danger of the living generation, seeing that the popular education has become improved, but the puritanical fanaticism of the cry for equality, that will follow more Bentham's lead than that of the French, but which will on that account be all the more acute.

We might, on the other hand, again object, that the modern formation of the elective bodies is similar to what has been attempted more than once in continental States (under strong monarchical initiative and control) without jeopardizing them to any great degree. But the tenfold increase of the electors in a single half century has another significance for England, since the existence of ministries and the conduct of the government of the realm has become almost exclusively dependent upon the House of Commons. Now that all sanctions for moderating the struggles for social interests have ceased to be, *this* kind of party-government falls into a helpless dependence upon incalculable combinations of social interests, upon the relatively strongest prejudices, upon political agitation and the tactical artifices of party-governments, to which, under the second Reform Bill, both Disraeli and Gladstone have owed their position.

The necessary separation into a Conservative and Liberal parliamentary party, so essential to parliamentary government hitherto, exists no more in reality. Side by side with these two parties, there are (as in Germany) radical, con-

fessional, national, and fractions of class interests, independent members, and others, whose numbers are slowly but steadily increasing. The attitude of the English parliament has become so much altered under the influence of these elements, that the House has been compelled to resolve upon considerable restrictions of the right of speech, and once (in 1881) had even to exclude thirty-two unruly members. Ever since the Reform Bill of 1867, the disintegration of parliamentary parties has set the quasi-dictatorial influence of a single man, as the *personal* representative of the momentary average of public opinion, in the place of a party-government conducted in the traditional manner. Hence, until the era of radical governments, coalition ministries will alone be possible.

This situation impels us to a comparison with the older experiences of the Continent. Marvellous is the *blindness of the propertied classes* to the immediately approaching crises, which results from the fact that, in the narrower social spheres, the dislocation of the great political institutions is not perceived. A peer living as a private gentleman, who in former generations formed quite an exception, becomes rather the rule, at the very time when the Upper House will shortly have to struggle for its very existence. An irresistible desire to travel comes over the English gentry at a time when their presence at their country seats is more necessary than ever, in order that they do not entirely lose their local influence. The daily press, and literature generally, move with untiring energy in all the spheres of natural and moral sciences, just as if the great English political system was in a haven of rest. The daily press lives on in a state of self-forgetfulness and self-deception as to the vital conditions of the State, as if the burning question as to the "to be or not to be" of the parliamentary constitution must further be decided by the papal infallibility of "public opinion." Everything precisely as it was once in Germany and France before great catastrophes.

But at the same time our older experiences suggest a mode of solving the problem. Insensible as public opinion appears

to be to the sight of the abyss in which the State is moving, yet, in proportion to its blindness, wonderful and violent is the *change* wrought, as soon as the political and social catastrophes have occurred, whether they come at first from without or within, or, as ordinarily happens, from both sides at once. The outsider may venture to prophesy, that public opinion will be difficult to recognize at the close of the century, and that the influential daily and periodical press of these days would be astonished, could it only be allowed to read itself at the close of it, and to see how disastrous for the fate of nations its idolatry of "public opinion" has been. The propertied classes, in defending their own, will certainly not at first display their best qualities, but the nation as a whole will do so. Only amid the blows of fate and trials do noble and grand nations show their true nature; only then does the sense of duty towards the State, to-day latent, awake in full vigour. In this time of trials, France and Germany gained the capacity to impose upon themselves the heaviest sacrifices of which society is capable—namely, universal personal military service. The courage, the strength of character and the practical sagacity of the British nation, now standing before us after a thousand years of steady development, are guarantees that here also the political sense of duty will re-awake and accomplish the re-construction of the ruined bases of its free political system. Like as the human organism possesses the vital energy necessary for restoring or replacing injured or mutilated functions, so too does the State possess this vitality. The first problem the organic legislature has to face is this; to take in hand the necessary work of reconstructing the county-constitution, in which *the restoration of the personal duties of citizenship in self-government* has for England almost the same signification, as universal military service imports for continental nations. As soon as this problem is taken in hand, the propertied classes will at length perceive the disintegration that has been proceeding in their political body, and, it is conceivable, that, under the moderamen of the monarchy, a check to its

further progress will be given, and a change take place for the better. At all events, the Crown will avert the extreme dangers attendant upon a democratic conduct of the *foreign* affairs of such an empire, owing to the fact that it has already (1850) grasped these prerogatives of its own with a firm hand. In the life of nations, as in that of individuals, it is friends, who instead of flattering, foretell the approaching storm. Uniform as is, however, the current of social movement in the mid-European world, yet its issue has been various, according to the differences of nationalities and their previous political history.

It has been ordained that the life of a nation, as of an individual, should, for its future weal, undergo such trials: yet the whole of the past history of the British State, as it lies before us in its thousand years' development as a creation of the moral and legal consciousness of the people, justifies our confidence that it will brave the storms before its path and, like the German nation, whose latent strength has ever resided in its communal system, find in its *own* past the stones wherewith to reconstruct the edifice of its free political system.

THE IRISH QUESTION.

NOTE TO CHAPTER LIX.—The thorn in the side of the parliamentary constitution, which is destined to urge the halting movement into action, is Ireland, where the conditions of property, owing to confiscations *en masse*, centuries of desolation and robbery, have come into an unnatural position. The dispossessed native population agitates for an Agrarian Legislation; a national middle class upon hereditary estates. But the model close at hand, the often quoted Stein-Hardenberg agrarian legislation, is not applicable to Ireland. That Prussian legislation assigned the fee simple of the land to a peasantry which had, for generations past, paid the land-taxes and done personal military service in the place of the noble landowners. The legal title to the acquisition of a "divided property" was the same as in the middle ages, when the nobles claimed and demanded the hereditability of their fiefs.

The new Irish land bills, on the contrary, involve a partial confiscation of private income, from purely political and economic views of utility, for which neither legal title, nor measure, nor limit can be found. The greed engendered of them will next extend to Scotland, Wales, and old England, and, hand in hand with the attacks upon the English State Church, drive the great landowners and the ruling class from a conservative into a reactionary attitude.

The social tendency thus begun can, however, only end in a *severance* of Ireland from the parliamentary union of Great Britain. The ever-loose coherence of both parts of the realm entirely

loses, owing to the hostile contrasts of both powerful Churches and the keen antipathy of races, the conditions precedent to a common popular representation. This separation of the Irish political body will even be necessary, in order to restore to the Parliament of Great Britain that fundamental unity upon which both the parliament itself and the several parties depend for their capability for action. On the other hand, Ireland must be given that kind of constitution (home rule) which is practicable in the case of an essentially Celtic nationality and a population split asunder by the contrasts of religion and race. This form of the future "imperial dependency" will, I believe, approach that of the "Napoleonic Constitutions:" a parliament, the members composing which are mostly appointed by the Crown, and a prefectorial system with deliberating "conseils," which last are even now, in some parts of the country, attaining to greater independence, and this leads us to hope that real self-government will, within the next generation, be attained. That the highly-gifted Irish nation is, owing to its want of self-control, but little suited for the direct application of English institutions, is proved by the experiences of the United States of America.

The experiences made in Germany, under a strong monarchy, might seem to warrant that these organic reforms might be all effected *simultaneously* after Gladstone's plans. But, under the present system of *party* administrations, they can only take a course accompanied by violent and fitful movements within the great social body. They go too far in both directions to suit the present party-programmes, and call in view an "era of radical parties" which alone will be capable of passing Irish land bills, introducing reforms in the land and effecting a certain "disestablishment" of the Anglican Church. It will probably be reserved for the reactionary epoch ensuing to give the "imperial dependency," Ireland, a fitting constitution. This done, and when political parties have calmed down, we shall be able to look forward to the beginning of the internal reconstruction of the constitution upon the basis of the new "communitates," now once more coherent, to the reconsolidation of the influence of the propertied classes, and to the return of normal parliamentary activity.

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